18-2323-cv(L), 18-2552-cv(XAP)

United States Court of Appeals

for the

Second Circuit

TIME WARNER CABLE OF NEW YORK CITY LLC,

Petitioner-Cross-Respondent,

– v. –

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

JOINT APPENDIX
Volume 3 of 3 (Pages A-521 to A-673)

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New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TIME WARNER CABLE NEW YORK CITY, LLC

and Case 02–CA–126860

LOCAL UNION NO. 3 INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,
AFL–CIO

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LLP), of Melville, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case arises out of union strike activity that occurred in front of Time Warner Cable New York City, LLC's (the Company) facility at Paidge Avenue in Brooklyn, New York, during the morning of April 2, 2014.[1] During its subsequent investigation, the Company questioned employees regarding their participation in the work stoppage and disciplined numerous employees. Most employees who were present received final warning letters. However, seven employees deemed to have engaged in the most serious misconduct received 2-week suspensions. Three were suspended because they engaged in active misconduct by constructing a vehicular blockade of company operations. The other four employees—Diana Cabrera, Azeam Ali, Ralf Anderson and Frank Tsavaris—were suspended because they were off duty at the time and had no legitimate reason to be at that location.

This case was tried in New York, New York, on April 11–13, 2016. Local Union No. 3 International Brotherhood of Electrical Workers AFL–CIO (the Union or Charging Party) filed and served the charge and amended charge on April 18 and August 19, 2014, respectively, and

[1] All dates are 2014 unless otherwise indicated.

the General Counsel issued the second amended complaint on March 31, 2016. The complaint alleges that the Company's questioning of employees following the strike constituted coercive interrogation in violation of Section 8(a)(1) of the National Labor Relations Act[2] and that its suspensions of Cabrera, Ali, Anderson, and Tsavaris unlawfully discriminated against them in violation of Section 8(a)(3) because they engaged in protected union activity initiated by the Union.

The Company alleges that the four discriminatees did not engage in protected conduct because (1) at the time of the events in question, their actions contravened the no-strike provision in a collective-bargaining agreement (CBA), and (2) they participated in mass picketing that interfered with ingress to and egress from the Company's facility.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a domestic limited liability company, is engaged in providing cable television, telephone and high speed internet services at its facility in Brooklyn, New York, where it annually derives gross revenues in excess of $100,000 and purchases and receives goods, supplies, and utilities valued in excess of $5000 directly from suppliers outside the State of New York. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company operates six divisions in the New York City metropolitan area: Northern Manhattan, Southern Manhattan, Brooklyn, Queens and Staten Island, New York, and Bergen County, New Jersey (collectively referred to as the six facilities or divisions). The Southern Manhattan Division, headquartered in an expansive facility located on Paidge Avenue in Brooklyn (the facility), provides service (television, internet, security, and telephone) to all of the Company's residential and commercial customers in Manhattan south of 86th Street. It houses dispatch, communications, technical operations (installation, service, and repair), construction, and survey and design personnel and equipment. The facility encompasses executive offices, an indoor garage, outside parking areas, a staff of over 600 (including various kinds of technicians,

[2] 29 U.S.C. §§ 158(a)(1), et seq.

foremen, and managers) as well as a fleet of company vehicles. The facility is next door to a New York City Fire Department annex that houses large emergency vehicles.

B. The Collective-Bargaining Relationship With The Union

The Union has represented company employees at the six facilities for over 10 years. CBAs reached between the Company and Union in 2005 and 2009 were each accompanied by Riders specific to each facility and preceded by a comprehensive memorandum of agreement (MOU). The 2009 CBA expired on March 31, 2013. It contained, in pertinent part, a no-strike clause at section 31: "There shall be no cessation or stoppage of work, service or employment on the part of or the instance of either party, during the term of this agreement."

On January 3, 2013, prior to the commencement of bargaining over a successor CBA, a bargaining unit employee at one of the six locations filed a decertification petition with Region 22 seeking to decertify the Union as the collective-bargaining representative of employees at that facility. After a hearing, the Regional Director for Region 22 dismissed the petition on the ground that the most appropriate unit in the decertification context should have been a multi-location unit consisting of the six facilities. The Company did not contest that decision and subsequently agreed with the Union that all six facilities would be treated as one single bargaining unit.

C. Negotiations for a Successor Agreement

Thereafter, bargaining resumed and the parties executed an MOU on March 28, 2013 summarizing agreed-upon changes to the expiring CBA for all six facilities. The introduction stated that "the full text of the applicable changes will be incorporated in a new Collective Bargaining Agreement which shall become effective, upon ratification by the Union membership, scheduled for April 4, 2013."[3] The new CBAs were to be effective from April 1, 2009 to March 31, 2013. The employees at the six facilities ratified the MOUs in a single vote. There was no separate ratification vote, however, regarding the terms and conditions contained in the previous location specific Riders. The 2009–2013 Riders addressed standby procedures at all six facilities, but also included additional issues specific to four facilities: Staten Island facility—vacation, temporary employees and work performed by classification; Bergen facility—bargaining unit work, sick days, work schedules, journeyman and other designations; Northern Manhattan—double compensation for overtime work on weekends; Southern Manhattan—elimination of certain service and maintenance work, and dispatch department function.

Although the parties had not yet integrated the substance of the agreement embodied in the MOU into the standard CBA format covering employees at all six facilities, the Company implemented several changes contained in the MOU as of April 1, 2013. They included wages and increases in payments to the Union's annuity fund.

[3] The summary of changes included provisions addressing: the term of agreement; subcontracting and contracting out work; telephony deleted; workweeks, hours and shifts; overtime; holidays; annuity payments; social security contributions; education fund; wages rates and premium pay; journeymen rights; work performed by nonjourneymen; and payroll savings plan deleted.

On May 14, 2013, the Company provided the Union with a draft of a successor CBA. The draft incorporated the identical provisions of the expired CBA, along with the changes set forth in the MOU provisions the six locations. None of identical provisions, which included the no-strike clause, were discussed during negotiations. Missing, however, were the facility specific Riders that accompanied previous CBAs.

On July 8, 2013, the Union informed the Company that the draft omitted the Riders and language pertaining to bonuses for electrical engineering degrees. After an exchange of communications disagreeing over whether the parties agreed to include these provisions in the successor agreement, the parties met again on September 9, 2013. The Company continued to maintain that it would not agree to include the Riders in the successor agreement. On that basis, the Union refused the Company's demand that it execute the draft successor agreement. After further negotiations in February and March 2014, the Company proposed revised versions of several Riders in a new successor contract. Several communications followed regarding the Company's omission of the electrical engineers provision and the Southern Manhattan Rider.

On March 31, after concluding that the Union would not sign any of the proposed CBAs sent to it by the Company, the Company filed an unfair labor practice charge alleging, pursuant to *H. J. Heinz Co. v. NLRB,* 311 U.S. 514 (1941), that the Union failed to execute a written agreement embodying the MOA.[4]

In a decision and recommended order, issued April 28, 2015, and adopted by the Board on October 29, 2015, Judge Steven Fish concluded that the Union did not violate Section 8(b)(3) by refusing to execute the successor CBA. He based that decision on the insufficiency of evidence demonstrating that the parties reached a "meeting of the minds" on all substantive issues, or that the documents submitted by the Company to the Union for execution accurately incorporated any such agreement. *Electrical Workers IBEW* Local *3 (Time Warner Cable),* 363 NLRB No. 30, slip op. at 16 (2015).

In denying the Company's motion to reopen the record to admit posthearing evidence of grievances filed by the Union, which allegedly constituted admissions that the Union unlawfully refused to execute an agreed-upon contract, the Board noted:

> The Charging Party contends that this evidence demonstrates that the [Company] unlawfully refused to execute an agreed-upon contract. Contrary to the [Company's] contention, the [Union's] posthearing conduct shows only that the [Company] mistakenly believed that the parties had reached agreement on March 28, 2013. It does not bear on the relevant question of whether the parties reached a meeting of the minds regarding all material terms of their successor contract.

The Board provided further clarification as to why the Union did not violate Section 8(b)(3) of the Act by refusing to execute the successor CBA:

[4] The Union also filed an 8(a)(5) and (1) charge arising out of the same transaction but that charge was dismissed by the Region.

> [W]e find it unnecessary to pass on the judge's finding that the Charging Party's inclusion of the South Manhattan Rider in the copy of the contract it attached to its Federal district court complaint alleging a violation of the contractual no-strike clause constituted an admission that the Rider was part of the parties' agreement.

D. Foremen Are Disciplined

On April 1, 1 day after it filed unfair labor practices against the Union, the Company issued 2-day suspensions to several foremen, including Anderson and Tsavaris, for refusing a company directive requiring them to take tools home at the end of their shifts. The directive was the subject of the grievance process set forth in the expired CBA. In addition, Phil Papale, a shop steward, was suspended for conduct while representing a foreman during the grievance process.

Shortly after their suspensions, Anderson and Tsavaris informed Derek Jordan, their union representative. Anderson also informed Jordan that a shop steward was not present when he was issued the suspension.[5] Jordan and other union representatives responded by calling for bargaining unit members to attend a "safety meeting" outside the facility the next morning.[6]

E. The Union Disrupts Company Operations On April 2

On a typical day in 2014, between 6:30 and 8 a.m. approximately 150 field technicians drove their personal vehicles to work, parked on a lot adjacent to the Paidge Avenue facility, entered the facility to receive assignments from their foremen, and then drove designated company vehicles out of the facility to customer service locations. In addition to dispatching vehicles from the warehouse and repairing them there, the Company also receives shipments of equipment and supplies at the facility.

As depicted by the Company's closed-circuit security camera video, at about 6:23 a.m. on April 2, 2014, Jordan arrived in front of the facility for the purpose of initiating a work stoppage or strike. Although there were available parking spots along the curb, he parked his vehicle perpendicular to the direction of traffic in the middle of Paidge Avenue.[7] Shortly thereafter, Jordan directed several Company employees to move their vehicles from parking spots and position them in similar fashion, perpendicular to traffic, in the middle of the street.[8] Over the next 10 minutes, six more vehicles parked in the middle of Paidge Avenue. The result was that, by 6:33 a.m., vehicles could no longer access or exit from the facility, including the

[5] GC Exh. 31, 33.

[6] Cabrera testified that the Union announced the "safety meeting" the previous day on social media. (Tr. 165.), while Tsavaris testified that he was notified about the meeting in an early morning call from his shop steward on April 2. (Tr. 189–190.) I found it peculiar that the 4 discriminatees would travel to Paidge Avenue on their day off for a safety meeting. Nevertheless, there is insufficient credible evidence to conclude that any of them knew beforehand that the Union planned a work stoppage.

[7] Jordan's denial that he precipitated a "job action" and merely convened a "safety meeting" in order "to get the workers to go back to work or to go to work," was not credible. Responding to the previous day's suspension of the foremen, he orchestrated a work stoppage by positioning vehicles in the middle of the street and instructing employees to gather there in order to impede company operations commencing with the 7 and 7:30 a.m. shifts. (Tr. 367–368, 370–371, 389–390).

[8] GC Exh. 20.

main entrance, garage entrance and employee parking lot.[9]

By 7 a.m., about 50 employees gathered in between the vehicles positioned in the middle of the street. As they congregated, union representatives handed them fliers regarding work safety and *Weingarten* rights to representation during disciplinary interviews.[10] At about 7:30 a.m. Jordan motioned employees to gather around him in the middle of the street. He then proceeded to address employee safety concerns relating to the absence of their suspended foreman, as well as their *Weingarten* rights. The gathering broke up at about 8 a.m. and Paidge Avenue was reopened to vehicular traffic.[11]

Gregg Cory, the Company's area vice president for Southern Manhattan, was apprised immediately about the vehicles parked in the middle of the street. Cory called the Company's security office, which in turn called the police department. Police officers responded shortly thereafter and spoke with Jordan. He assured them that the crowd would soon disperse.

As a result of the impeded access to the facility, approximately 77 technicians on the 7 and 7:30 a.m. shifts were unable to access the facility or company vehicles in the adjacent parking lot. This further resulted in a half hour or a 1-hour delay (depending on the shift) before technicians' could leave the facility in order to make scheduled appointments. The disruption caused a ripple effect of delayed or missed appointments throughout the day.

Cabrera, Ali, Anderson, and Tsavaris were not scheduled to work at the time, but decided to attend the event. All were aware that the Union called a "safety meeting." Anderson arrived early after driving 55 miles from his home to Paidge Avenue, parked and took a nap. Ali also drove his vehicle from Suffolk County and even picked up a coworker to attend the meeting. Diana Cabrera learned about the event on social media and, although she usually commuted to work by train or taxi, she was given a ride to the event by a coworker.[12]

The gathering dispersed at approximately 8 a.m., enabling technicians on the 7 and 7:30 a.m. shifts to report to work and begin their shifts.

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[9] GC Exh. 23A-B.

[10] Referring to the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975) affirming employees' rights to union representation at investigatory interviews.

[11] It is undisputed that Paidge Street was completely blocked off and a back-alley exit, which Corey used to return into the facility, was not previously used as an entrance by employees arriving for work or while working. (Tr. 229, 235–240, 248–249, 265–273, 384; GC Exh. 19–20, 23, 29; R. Exh. 6–7, 9–10.)

[12] The four employees admitted to being a part of the group that gathered in the middle of Paidge Avenue. (R. Exhs. 3–4.). As previously noted, Tsavaris and Cabrera testified that the Union called a safety meeting for the morning of April 2 in front of the facility, while Anderson and Ali asserted that they inadvertently stumbled onto the scene. Anderson's testimony that he drove there on his day off in order to file a grievance over his suspension was not credible. It was preposterous to believe that he drove 55 miles from home, parked his vehicle, took a nap and suddenly woke up to realize that he was blocked in by other vehicles. After attending the event, he left without making any attempt to file his grievance. (Tr. 121, 129–130, 135–142.) Ali, who lives about 40 miles from the facility, testified that he planned to drive into Manhattan to pick up mail, but decided to give a coworker a ride to work, then parked and exited his vehicle because he was curious. That explanation was also absurd. (Tr. 143, 146, 156–162.)

F. The District Court Action

In April 2014, the Company also sought injunctive relief in the United States District Court for the Eastern District of New York pursuant to Section 301 of the Labor Management Relations Act. The suit alleged the Union's violation of the no-strike clause in the contract in September 2013, March and April 2, 2014. After a 3-day hearing, Judge Jack Weinstein found that two of the incidents described in the complaint constituted a strike in violation of the no-strike clause:

> That was not a safety meeting . . . They blocked ingress and egress to that plant. There was a substantial delay in starting operations that day. I'm holding it was a strike. I don't want to get involved in any euphemisms.

Nevertheless, Judge Weinstein dismissed the petition on May 5, on the ground that the disputes involved were subject to arbitration, were in the process of being arbitrated and there was no evidence or likelihood of further violations of the no-strike clauses.

G. Arbitration Brought By The Company

On April 17, the Company initiated an arbitration proceeding against the Union seeking damages and other relief for the events on April 2. After three sessions, Arbitrator Daniel Brent found:

> That the convocation of this "safety meeting" was a pretext to communicate to the Company the Union's dissatisfaction about requiring Foremen to carry tools is not simply a justifiable conclusion; it is the only reasonable conclusion. . . .
>
> Thus, by creating a sham safety meeting that not only impeded the timely arrival of bargaining unit employees for their shifts, but also involved many employees until well after the scheduled commencement of their shift hours, and to the extent that customers were deprived of their coveted early morning appointments and other customers were inconvenienced by unnecessary delay in keeping scheduled service appointments throughout the day on April 2, 2014, the Union was directly and inextricably culpable . . .

On November 30, 2015, Arbitrator Brent issued a final award and awarded the Company damages in the amount of $19,297.96.

H. The Investigatory Interviews

After the April 2d strike, the Company launched an investigation to determine the identities of employees involved in the blockade. Employees identified through surveillance video as having attended the work stoppage were summoned to interviews in mid-April. Using a standardized questionnaire, Concetta Ciliberti, Mary Maldonoado, and other human resources department managers and supervisors asked each employee nearly two dozen questions.[13] They started with preliminary questions about tenure with the Company, assigned schedules and to

[13] R. Exh. 26–31.

whom they reported. The employees were also asked whether they were part of the group of employees who gathered outside the Paidge Avenue facility on April 2, how they got to work, whether they parked, if they arrived in a company vehicle, and what time they arrived. If the employee denied being present, he/she was shown photographs or the video indicating otherwise.

After establishing that the employee was present at the gathering, he or she was told, "It appears that Derek Jordan was present as well." The employee was then asked "who told" the employee about the gathering, "when" the employee received "notification of the gathering," how the "event" was "communicated" to the employee, and what the employee was "told about the reason for the protest." Any employees professing ignorance about the gathering and claiming not to be involved were asked why they remained outside and if they attempted to contact a manager or otherwise attempt to enter the facility.

Employees were then asked questions about the CBA and if they were "familiar with the section that prohibits cessation or stoppage of work." Reading from the script, company managers and supervisors recited that provision followed by standard comments conveying the ramifications of his/her actions on April 2:

> There shall be no cessation or stoppage of work, service or employment, on the part of, or at the insistence of either party, during the term of this Agreement.
>
> You understand that this rally stopped the work of the SNYC Area for over one hour prohibiting us from meeting our service calendar. As a result of this violation of the law and CBA and the inability to maintain our business. Do you understand that this action subjects you to discipline, including possible termination?
>
> (If the employee asks what happens next)
> We are gathering facts and you should return to work. To be clear, you are prohibited from engaging in any work slowdown or any other action which impacts on workflow. Any attempts to do so will lead to further discipline, including the possibility of immediate termination.
> If you have anything else you want to share w/me please call me or send me an email by tomorrow.

The four discriminatees, as well anyone else who was not scheduled to work on April 2, were also asked the following form questions:

> Why did you come to work? Did anyone in management direct you to come to work?
> [For previously suspended employees] Why did you come to work that day?
> You understand that a suspension means that you are not to come to work?
> You understand that you were in violation of your suspension by coming to work on April 2? Who directed you to come to work?

Cabrera told company investigators that she drove to the facility merely to drop someone off.[14] Ali also professed ignorance about the event, insisting he only drove to the facility in order

[14] Cabrera testified differently at the hearing, explaining that she got a ride to the facility with a

to drop someone off while on his way into Manhattan. He also told them that after venturing to the gathering, he learned that the gathering was described as a work safety meeting.[15] Anderson conceded that he was present at the site, but gave no explanation as to why he was there.[16] Tsavaris stated that he "just happened to be in the neighborhood" for "personal" reasons.[17]

I. The Suspensions

On May 22, 2014, the Company issued 2-week suspensions to seven employees determined to be the most culpable for the strike, either because they had no reason to be present other than to participate in the job action or because they engaged in particularly egregious conduct.[18] Approximately 34 employees, all of whom were scheduled to work during the work stoppage, received final written warnings. However, the Company overlooked the roles played by the facility's two shop stewards, including Papale, who was among those suspended on April 1 and not scheduled to work on April 2.[19]

Byron Yu was on the schedule at the time of the strike and played an active role by parking his vehicle in the middle of the street. Joseph McGovern, had called out sick earlier that day. David Lopez was assigned to another company facility and was scheduled to work later that day. The remaining four employees—Ali, Cabrera, Anderson, and Tsavaris—were not scheduled to work that day. The corrective action forms cited four grounds: violation of rules, safety violation, misconduct and "other." Their notices of discipline were virtually identical, with minor differences in the next to last paragraph of each:

> Attached is a disciplinary notice that you are being issued a final written warning and being suspended for two weeks effective May 22, 2014 for your role in the April 2 work stoppage in violation of the collective bargaining agreement.
>
> On the day of the illegal strike you were not scheduled to work, but appeared at Paidge Avenue to instigate and participate in the illegal work stoppage. You showed a complete disregard for your responsibilities to the Company and our customers, intentionally impeding service to our customers in violation of the no strike provision in the collective bargaining agreement.
>
> Your conduct justifies immediate termination. However, because we believe you were misled by the Union both about engaging in this conduct and about the consequences of your actions, we are going to give you this last chance. Your participation in any further

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coworker after learning of the "safety meeting" on social media. (Tr. 165.) Given her shifting explanations, I credit Maldonado's denial that she told Cabrera it would constitute insubordination for her to fail to respond. (GC Exh. 15; Tr. 290–291, 303–304, 308–309.)

[15] Ali's explanation to investigators was consistent with his testimony. (GC Exh. 14; Tr. 143, 146.)

[16] Anderson's statements to Maldonado contradicted the video evidence and his hearing testimony. (Tr. 285–287; R. Exh. 14; GC Exh. 16.)

[17] Contrary to his vague explanation to company investigators, Tsavaris conceded at hearing that he was present on Paidge Avenue that morning at Papale's instruction. (GC Exh. 17; Tr. 189–192, 195–196.)

[18] The disciplinary decisions were made by Ciliberti, Cory, and Regional Vice President of Operations John Quigley. (Tr. 113–120.)

[19] GC Exh. 4–7, 28.

work stoppages or other activities to impede the Company's business in violation of the collective bargaining agreement will lead to your immediate termination.

You should understand that your blind adherence to the Union's unlawful directives not only put you in danger of losing your job, but reflects very badly on you.

The Company and our customers expect more of you.[20]

J. Regional Director Revokes Dismissal of Union's Charge

On January 5, 2015, the Regional Director for Region 2 dismissed the instant charge on the ground that the April 2nd strike, spurred by the suspension of five foremen and the alleged violation of their *Weingarten* rights, violated the no-strike clause of the CBA and, thus, the Act. Additionally, she opined that the alleged unfair labor practices precipitating the April 2nd work stoppage were not sufficiently serious as to justify overriding the no-strike clause and that the suspensions flowed from employee misconduct during the unprotected strike. However, after Judge Fish issued the aforementioned decision on April 28, 2015, dismissing the complaint alleging unfair labor practices by the Union during the April 2 strike, the Regional Director revoked the dismissal of the instant charge on May 21, 2015.

K. The Board Denies The Company's Motion For Summary Judgment

On February 8, 2016, the Company moved for summary judgment dismissing the complaint allegation that it violated Section 8(a)(3) and (1) of the Act when it suspended Diane Cabrera for engaging in serious misconduct by participating in "a job action led by the Charging Party." The motion alleged that the "job action" upon which the complaint is premised constituted a "complete blockade" and disruption of Company's operations for over an hour and, thus, did not constitute protected activity under Section 7 of the Act. The motion was amended by the Regional Director in order to add the three additional employees who were also suspended – Azeam Ali, Andersen, and Tsavaris.

The General Counsel opposed the motion on the ground that there were genuine factual issues as to whether the four suspended employees lost the protection of the Act by their conduct during the strike activity. On April 8, 2016, the Board denied the Company's Motion for Summary Judgment on the ground that it failed to demonstrate the absence of issues of fact.

LEGAL ANALYSIS

I. The Suspensions

The General Counsel and Charging Party allege that the 2-week suspensions issued to Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris constituted unfair labor practices under Section 8(a)(3) and)(1) of the Act. The Company insists that the job action was actually

[20] The next to last paragraph in Ali's notice added "on you as a foreman" at the end of the sentence, while the notices issued to Anderson and Tsavaris added "on a foreman with your tenure with the Company." (GC Exhs. 4–7.)

an unlawful mass picket and, thus, the discriminatees engaged in misconduct by being at the event. The Company further contends that such misconduct rendered their activity unprotected.

NLRB v. Burnup & Sims, 379 U.S. 21 (1964), provides the applicable legal standard in cases involving employer discipline of employees who engage in misconduct during protected activities. Under the *Burnup & Sims* test, discipline is unlawful "if it is shown that the employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the [discipline] was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." Id. at 23.[21]

As orchestrated by the Union, several union officials and company employees halted company operations at 6:33 a.m. on April 2 by positioning seven vehicles in the street in front of the facility. The Union announced the event as a safety meeting and Jordan speak to employees about their *Weingarten* rights and the need to be careful in the field due to the unavailability of suspended foremen. However, the blockade orchestrated by the Union clearly amounted to a work stoppage or strike that lasted nearly 90 minutes and service appointments by technicians were delayed by either a half hour or a full hour. The four discriminatees were part of the group of employees who gathered in front of the Company's facility after the blockade was in place. All four went there at the behest of the Union.

A. *The No-Strike Clause*

Attendance by the four discriminatees at a Union event, including a work stoppage, discussing and/or protesting the Company's discipline of foremen and alleged violation of some of their *Weingarten* rights clearly constituted protected concerted activity. See *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964) (activity relating to group action in the interest of the employees). However, that conduct lost its protection if it violated an extant no-strike prohibition incorporated into the terms and conditions of their employment. That, in turn, requires an initial determination as to whether the no-strike clause in the expired CBA still applied to unit members as of April 2.

The Board's decision in*, IBEW Local 3 (Time Warner Cable)* serves as the law of the case on the issue of whether there was an agreement between the parties regarding the expired CBA by virtue of the MOU entered into by the parties: there was no meeting of the minds as to significant portions of the agreement (the inclusion of local Riders) and thus, the parties did not agree to all of the material terms of a successor CBA.[22] See, e.g., *Great Lakes Chemical Corp.*,

[21] The Company's reliance on *Wright Line*, 251 NLR.B 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), is misplaced. It would have been appropriate if the Company had also disciplined the discriminatees for reasons unrelated to the allegedly protected activity, which is not the case. *Wright Line*, 251 NLRB at 20–21); *Transportation Management Corp*., 462 U.S. at 401–402 ("dual motive" analysis applicable where the protected conduct is shown to be a motivating factor in the discipline, in which case the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct").

[22] The Company's reliance on district court litigation and arbitration between the Company and the Union containing conclusions to the contrary is unavailing. "The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully." *Field*

300 NLRB 1024, 1025 fn. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992), and cases cited therein (generally, a finding necessary to support the judgment in a prior proceeding bars relitigation on that issue in a subsequent proceeding involving the same parties.")

It is the MOU and not the inability to agree to a successor CBA, which is dispositive with respect to the applicability of the no-strike clause to the events of April 2. The no-strike clause was among the numerous provisions of the expired CBA that were to carry over to the successor CBA but were not mentioned in the MOU. Its incorporation by reference in the MOU is evidenced by the introduction: '[T]he changes summarized below were agreed upon *relative to the [CBA] which will expire on March 31, 2013* and that the full text of the applicable changes will be incorporated in a new [CBA] which shall become effective upon ratification by the Union membership, scheduled for April 4, 2013." (emphasis supplied) The only reasonable interpretation of that preamble is that the changes mentioned into the MOU were being added to the language of the expired CBA along with those provisions not mentioned.

It has long been established that an employer violates Section 8(a)(5) when it unilaterally changes employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative prior notice and meaningful opportunity to bargain about the changes. *NLRB v. Katz,* 369 U.S. 736, 742-743 (1962). The *Katz* rule, initially applied to newly certified unions, also extends to situations where the parties' agreement has expired and negotiations continue over a successor contract. In such instances, with certain exceptions, the parties are required to continue in effect terms and conditions of employment that are mandatory subjects of bargaining. *Litton Financial Printing Division v. NLRB,* 501 U.S. 190, 198 (1991).

In *Litton,* the court held that no-strike clauses, arbitration provisions and management rights clauses were mandatory subjects of bargaining but did not survive expiration of the contract. The court distinguished such provisions from other terms and conditions that survived because they represented the waiver of statutory rights that employees would otherwise enjoy in the interest of achieving an agreement. Id. at 199.

The parties bargained over the inclusion of Riders in a successor CBA. In the meantime, they continued to adhere to the *status quo ante*, with the exception of the Company's prompt implementation of the wage and benefits provisions of the MOU. This served as the Company's *quid pro quo* and evidence of the parties intent to continue applying certain terms and conditions of the expired CBA, such as the no-strike clause. See *Crimptex, Inc.,* 211 NLRB 855, 858 (1974) (evidence consistent with parties' intention to be bound until the final contract was executed); *Granite Construction Co.,* 330 NLRB 205, 208 (1999) (affirmative nod evidenced an oral agreement to extend the contract until the next bargaining session).

Bridge Associates, 306 NLRB 322, 322 (1992), enfd. sub nom. *Service Employees Local 32B-32J v. NLRB*, 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993). As the Board noted in *Teamsters Local 769, successor to Teamsters Local 390*, 355 NLRB 197, 200 (2010), this view is consistent with the "well established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests." (quoting *Herman v. South Carolina National Bank*, 140 F.3d 1413, 1425 (11th Cir. 1998).

The Board recently referenced the *Litton* principles in *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 2 (2015). In that case, the Board overruled a contrary earlier decision in *Bethlehem Steel,* 136 NLRB 1500 (1962) and its progeny, holding that an employer's obligation to check off union dues constituted a mandatory subject of bargaining and, thus, survived contract expiration. Describing its inextricable link to wages and benefits, the Board distinguished dues checks from no-strike clauses, arbitration and provisions and management rights, which do not survive the contract. Id. at 3.

Litton and *Lincoln Lutheran* are distinguishable. Both cases involved the expiration of CBAs and there was an absence of evidence of subsequent intent by the parties to continue following the contractual provisions at issue. In the instant case, however, the intention of the parties was reflected in the MOU, which incorporated certain provisions from the expired CBA, including the no-strike clause. The MOU constituted a clear continuation of the waiver of employees' rights set forth in the expired CBA. *See Provena Hosps., d/b/a Provena St. Joseph Med. Ctr. & Illinois Nurses Ass'n*, 350 NLRB 808, 812 (2007) (finding that the waiver of a statutory right has to be explicit as well as clear and unmistakable).

Therefore, the no-strike clause, which remained in effect on April 2, prohibited the four discriminatees from the "cessation or stoppage of work, service or employment on April 2. Contrary to the Company's assertion, however, the four discriminatees did not violate the terms of the no-strike clause since they were in a nonworking status at the time. As such, they could not be deemed to have ceased or stopped working during the pendency of the strike.

B. The Conduct of The Discriminatees During the Strike

Even in the absence of an applicable no-strike clause, the activities of the four discriminatees would negate otherwise protected conduct if the Company had a reasonable belief that the employees were engaged in misconduct and the employees did, in fact, engage in misconduct. *Medite of New Mexico, Inc. v. NLRB,* 72 F.3d 780, 790 (10th Cir. 1995) (employer's refusal to reinstate employees justified based on "honest belief" that they engaged in misconduct during strike); *Machinists Local 1150* (*Cory Corp.*), 84 NLRB. 972, 975–976 fn. 9 (1949).

The evidence reveals that the four discriminatees went to the gathering on Paidge Street for a union meeting relating to working conditions, disciplinary actions, grievances and employees' *Weingarten* rights. Over approximately 2 weeks following the April 2 event, company managers and supervisors reviewed security video revealing that the blockade of its operations was fully in place by 6:33 a.m. As a result, prior to calling in the four discriminatees for their disciplinary/investigatory interviews, company officials knew that they were present during the strike, but did not cause the vehicular blockade of company operations. The blockade was implemented by union officials and other employees, and was already in place by the time the four discriminatees congregated in the middle of Paidge Avenue. Moreover, there is no credible evidence that any of the four discriminatees knew before arriving for the event that it would be venued in between vehicles parked in the middle of Paidge Avenue in a manner that would bring company operations to a halt.

Under the circumstances, the relatively passive participation of the four discriminatees at the strike location did not constitute misconduct. See *Abilities & Goodwill*, 241 NLRB 27, 31

(1979) (employer unlawfully discharged striking employees for passive participation in strike); *Bowman Transportation Co.*, 112 NLRB 387, 388 (1955) (insufficient evidence of disciplined employee's active participation in strike). Simply participating in a picket is not grounds for discipline because it would undo the active vs. passive test long applied by the Board. See *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 738 F.2d 1404, 1408 (4th Cir. 1984) (abusive behavior does not amount to serious strike misconduct unless it reasonably tends to coerce or intimidate coworkers); *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984) (quoting *NLRB. v. W.C. McQuaide, Inc.,* 552 F.2d 519, 528 (3d Cir. 1977) (misconduct has to reasonably coerce or intimidate employees from exercising their rights); Cf. *Big Horn Coal Co.*, 309 NLRB 255, 259 (1992) (picketing employees engaged in misconduct by actively interfering with the right of nonstriking employees to continue working).

The cases cited by the Company are distinguishable. In *Detroit Newspapers*, 342 NLRB 223 (2004), several disciplined employees actively intimidated and violently assaulted coworkers. Id. at 233–234. However, in the case of one employee disciplined for blocking the view of a delivery truck that was backing out of the facility, the Board concluded that the employer did not have a good faith belief that the employee engaged in misconduct. Id. at 231 (surveillance video showed that the employee was not an active participant in blocking the truck driver's view).

In *Kohler*, 128 NLRB 1062 (1960), employees participated in a strike that lasted months and in which the participants were actively engaged in the picket lines that blocked access to the plant. In that case, disciplined employees positioned their bodies in order to block non-striking employees from entering the plant. Id. at 1180. In contrast, the Company knew from reviewing security video that the four discriminatees simply stood in the crowd and had no involvement in constructing the vehicular blockade of the Company's facility and operations. Under the circumstances, the Company unlawfully suspended Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris in violation of Section 8(a)(3) and (1) of the Act.

II. The Interrogations

The complaint alleges that the Company unlawfully interrogated employees regarding their "union activities and sympathies of other employees" in the April 2 strike. The Company contends that its questioning of employees was lawful because it related to employee conduct during unprotected mass picketing.

Section 8(a)(1) of the Act prohibits employers from questioning employees in a manner that tends to restrain, coerce or interfere with protected concerted activity. *Rossmore House*, 269 NLRB 1176, 1177 (1984). In determining whether questioning is coercive, we must examine the "totality of the circumstances." Id. at 1178. Factors in determining whether an interrogation is coercive include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply. *Bourne v. NLRB.*, 332 F.2d 47, 48 (2d Cir. 1964). The *Bourne* factors provide a framework to use when assessing the lawfulness of employee interrogation. *800 River Rd. Operating Co. LLC v. NLRB*, 784 F.3d 902, 913 (3d Cir. 2015); see also *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1179 (D.C. Cir. 1987) (questioning of employees about their participation in union election by

company president, who previously had little interaction with employees and espoused anti-union views, viewed as coercive).

Employees were instructed to meet with company managers, supervisors, and human resource staff in a conference room, where the company officials proceeded to rattle off questions from a prepared script. Certain questions asked of employees were reasonably related to a legitimate investigation seeking to identify employee misconduct, i.e., the perpetrators of the vehicular blockade. These included questions seeking to confirm the employee's presence in front of the facility on April 2, their arrival time, how they got there, whether they drove a company vehicle, and where they parked.

Other questions, however, went well beyond potential employee misconduct or involvement in the vehicular blockade by seeking to elicit employee knowledge about union activities. Employees were asked who told them about the gathering, how and when they learned about the gathering, and what they were told about the reason for the protest. After extracting information about the event, company officials tested employees on their knowledge of the CBA, asking whether they had reviewed it and were familiar with the no-strike clause.

The totality of the circumstances established that the questions relating to employee knowledge about the organization of the April 2 event were coercive. The questions were asked in a formal setting by human resource managers, supervisors, and staff in the presence of shop stewards. Having already established that the employee was present at the gathering on April 2, these questions revealed the possibility of potential or further discipline based on the employee's answers to the questions. See *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 710–711 (2005) (motivation for the questioning was to identify employees who were union sympathizers).

Since everyone in the interview room knew about the union-initiated activity that transpired on April 2, questions relating to communications and planning for the event reasonably conveyed the sense that the Company sought to unearth the employee's union activities, as well as the names of other employees involved with or sympathetic to the Union. A similar coercive effect resulted from the Company's inquiry as to why the four discriminatees, who were not scheduled to work that morning, were at the event. See *Metro-W. Ambulance Service,* , 360 NLRB No. 124, slip op. at 65 (2014) (employer policy preventing employees from being at work when not scheduled to work discouraged protected activities in violation of Sec. 8(a)(1).

Moreover, questions posed to employees about their knowledge of the CBA and, in particular, the no-strike clause, were unrelated to the determination of whether an employee participated in the blockade. Having apprised employees that they were being investigated and questioned in connection with their activities on April 2, inquiries about their familiarity with the CBA and the no-strike clause reasonably tended to chill employees' future union activities.

Under the circumstances, the Company interrogation of employees regarding the events of April 2 violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Time Warner Cable New York City, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union No. 3 International Brotherhood of Electrical Workers AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris on October 30, 2001, because they engaged in protected union activity by participating in a work stoppage on April 2, 2014.

4. Respondent coercively interrogated employees regarding the events of April 2, 2014, in violation of Section 8(a)(1) of the Act.

5. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily suspended employees, must make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Time Warner Cable New York City, LLC, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

Suspending or otherwise discriminating against employees because they engaged in protected union activity.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Coercively interrogating any employee about union support or union activities.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Make Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspensions of Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris and, within 3 days thereafter notify the employees in writing that this has been done and that the suspensions will not be used against them in any way.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Within 14 days after service by the Region, post at its facility Brooklyn, New York, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2014.

Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by Time Warner Cable New York City, LLC, if willing, at all places or in the same manner as notices to employees are customarily posted.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 14, 2016

Michael A. Rosas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT suspend or otherwise discriminate against any of you for supporting Local Union No. 3 International Brotherhood of Electrical Workers AFL–CIO or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Diana Cabrera, Azeam Ali, Ralf Anderson and Frank Tsavaris whole for any loss of earnings and other benefits resulting from their suspension, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions of Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris, and

WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions will not be used against them in any way.

TIME WARNER CABLE NEW YORK CITY, LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

A-540

JD–51–16

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Room 3614, New York, NY 10278-0104
(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-126860 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.

A-541

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIME WARNER CABLE NEW YORK CITY, LLC and LOCAL UNION NO. 3 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	Case 02-CA-126860

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., June 14, 2016**.**

By direction of the Board:

Gary Shinners

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **July 12, 2016.**

United States Government

OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570

July 6, 2016

Re: Time Warner Cable New York City LLC
Case 02-CA-126860

EXTENSION OF TIME TO FILE EXCEPTIONS AND SUPPORTING BRIEF

The request for extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of Exceptions and Brief In Support of Exceptions is extended to **July 26, 2016**. This extension applies to all parties.

/s/ Farah Z. Qureshi
Associate Executive Secretary

cc: Parties
Region

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 2

TIME WARNER CABLE NEW YORK CITY, LLC

Respondent

and **Case 02-CA-126860**

LOCAL UNION NO. 3 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Charging Party

GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to § 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel (the "General Counsel") hereby files the following limited exceptions to certain portions of the Decision and Recommended Order of Administrative Law Judge Michael A. Rosas, dated June 14, 2016, in Case No. 02-CA-126860.[1]

1. Although the ALJ correctly found that Respondent Time Warner Cable New York LLC (the "Respondent") violated Section 8(a)(3) and (1) of the Act by suspending four employees who participated in protected activity in support of Local No. 3 International Brotherhood of Electrical Workers, AFL-CIO (the "Union"), the ALJ erred by: (a) concluding that there was a no-strike clause in effect at the time of the activity pursuant to a Memorandum

[1] References to the Administrative Law Judge Decision will follow the format "ALJD [page number(s)]:[line number(s)]."

of Agreement between the parties (the "MOA"), and (b) thereby contradicting the Board's finding, in *Int'l Bhd. of Elec. Workers*, 363 NLRB No. 30, slip. op. (Oct. 29, 2015), that the parties had no meeting of the minds when entering into the MOA. (ALJD 12:32-37, 13:17-20.)

2. The ALJ erred by considering the issue in 363 NLRB No. 30 to be "whether there was an agreement between the parties regarding the expired CBA by virtue of the MOA" rather than considering the issue properly to be whether the parties effectively entered into a successor collective-bargaining agreement by signing the MOA. (ALJD 11:29-33.)

3. The ALJ erred by stating that the MOA and the parties' agreement to a successor collective-bargaining agreement are analytically separate concepts rather than properly reasoning that the MOA itself represented the parties' agreement to the terms of a successor contract. (ALJD 12:5-12.)

4. The ALJ incorrectly relied on *Crimptex, Inc.*, 211 NLRB 855, 858 (1974) and *Granite Construction Co.*, 330 NLRB 205, 208 (1999) to reach the erroneous conclusion that the MOA "served the [Respondent's] *quid pro quo* and evidence of the parties[sic] intent to continue applying . . . the no-strike clause." (ALJD 12:32-37.)

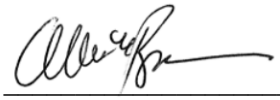
5. The ALJ erred in concluding that the MOA extended the Union's waiver of the right to strike found in the parties' expired collective-bargaining agreement even though the Board had concluded in 363 NLRB No. 30 that there was no meeting of the minds on the terms of the MOA. (ALJD:13:10-15.)

6. The ALJ erred in concluding that there was in effect a no-strike clause that prohibited the four discriminatees from engaging in a work stoppage. (ALJD 13:17-19.)

7. The ALJ erred by stating that the government was not a party to prior district court litigation. (ALJD 11:44-45).

Dated at New York, New York
July 26, 2016

Respectfully submitted,



Allen M. Rose
Counsel for the General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIME WARNER CABLE NEW YORK CITY LLC

and **Case 02-CA-126860**

LOCAL UNION NO. 3 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION BY RESPONDENT TIME WARNER CABLE OF NEW YORK CITY, LLC

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, as amended, Time Warner Cable New York City LLC (hereinafter "Time Warner Cable," "Respondent," or "the Company"), by its attorneys Kauff McGuire & Margolis LLP, hereby excepts to the June 14, 2016 Decision of Administrative Law Judge Michael A. Rosas ("the ALJ") in the above-captioned matter, JD-51-16 (hereinafter, "ALJD").

The ALJ erred as follows:

STATEMENT OF THE CASE

1. In asserting that Time Warner Cable suspended seven employees because they "construct[ed] a vehicular blockade of company operations," when in fact the four alleged discriminatees were suspended for participating in a blockade comprised of vehicles as well as pedestrians; and in failing to state that the employees' misconduct was unprotected. (ALJD p.1.)

FINDINGS OF FACT

II. Alleged Unfair Labor Practices

C. Negotiations for a Successor Agreement

2. In stating that "the 2009 CBA expired on March 31, 2013," inasmuch as that CBA was renewed and extended by virtue of the Memorandum of Agreement executed on March 28, 2013 ("MOA" or "MOU"). (ALJD p. 3, line 9.)

3. In stating that, following ratification of the March 28, 2013, the Company implemented "several changes contained in the MOU," inasmuch as the Company implemented all terms of the MOU. (ALJD p. 3, line 41.)

4. In purporting to summarize the April 28, 2015 recommended decision of ALJ Steven Fish. (ALJD p. 4, lines 23-29.)

D. Foremen Are Disciplined

5. In stating that several foremen were disciplined for refusing "to take tools home at the end of their shifts." (ALJD p. 5, line 10.)

6. In stating that Jordan arrived at the Paidge Avenue facility "for the purpose of initiating a work stoppage or strike" to the extent the ALJ fails to state that Jordan's purpose was also to prevent ingress to and egress from the facility. (ALJD p. 5, lines 29-30.)

7. In finding that "by 6:33 a.m., vehicles could no longer access or exit from the facility" to the extent the ALJ fails to state that this condition persisted until approximately 8:00 a.m. (ALJD p. 5, line 35.)

8. In finding that there was "insufficient credible evidence to conclude that any of [the four discriminatees] knew beforehand that the Union planned a work stoppage." (ALJD p.5, n.6.)

9. In finding that "the Union announced the 'safety meeting' the previous day on social media." (ALJD p. 5, n. 6.)

E. The Union Disrupts Company Operations On April 2

10. In finding that Derek Jordan actually "proceeded to address employee safety concerns" during the April 2, 2014 blockade, as well as in suggesting that any employees had actually voiced or held any such "safety concerns." (ALJD p.6, lines 6-8.)

11. In finding that "All [four alleged discriminatees] were aware that the Union called a 'safety meeting'." (ALJD p. 6, line 23.)

12. In finding that Ali "picked up a coworker to attend the meeting." (ALJD p. 6, line 25.)

K. The Board Denies The Company's Motion For Summary Judgment

13. In finding that "[t]he motion was amended by the Regional Director," when it was brought – and amended – by Time Warner Cable. (ALJD p.10, lines 28-29.)

LEGAL ANALYSIS

I. The Suspensions

14. In citing *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), as "the legal standard in cases involving employer discipline of employees who engage in misconduct during protected activities" insofar as this suggests that any employees here engaged in protected activities. (ALJD p.11, lines 4-6.)

15. In finding that "all four [of the alleged discriminates] went [to the blockade] at the behest of the Union." (ALJD p. 11, line 19.)

A. The No-Strike Clause

16. In holding that suspendees' mere attendance at any Union event "clearly constituted protected concerted activity." (ALJD p.11, lines 22-23.)

17. In holding that attendance at a Union event only "lost its protection if it violated an extant no-strike prohibition incorporated into the terms and conditions of their employment," which "requires an initial determination as to whether the no-strike clause in the expired CBA still applied" failing to state that such activity could have also lost its protection if it constituted participation in a mass picket. (ALJD p.11, lines 22-28.)

18. In holding that "[t]he Board's decision in *IBEW Local 3 (Time Warner Cable)* serves as the law of the case on the issue of whether there was an agreement between the parties regarding the expired CBA by virtue of the MOU entered into by the parties." (ALJD p. 11, lines 29-31.)

19. In stating that the Board in *IBEW Local 3 (Time Warner Cable)* held that, "there was no meeting of the minds as to significant portions of the agreement" and that "thus, the parties did not agree to all of the material terms of a successor CBA." (ALJD p. 11, lines 31-33.)

20. In failing to hold that the parties entered into a binding complete collective bargaining agreement for the term of April 1, 2013 through March 31, 2017 by virtue of the MOU. (ALJD p. 11, lines 31-33.)

21. In holding that Time Warner Cable's reliance on findings in the U.S. District Court is "unavailing" and suggesting that "the Government was not a party to the prior private litigation" (ALJD p.11, n.22), when in fact the Board intervened in the District Court case.

22. In stating that, following ratification of the MOA there was "prompt implementation of the wage and benefit provisions of the [MOA]" to the extent the ALJ fails to state that there was prompt implementation of all terms of the MOA. (ALJD p. 12, line 32.)

23. In holding that "the four discriminatees did not violate the terms of the no-strike clause since they were in a nonworking status at the time" of the blockade and thus "could not be deemed to have ceased or stopped working during the pendency of the strike." (ALJD p.13, lines 18-20.)

B. The Conduct of the Discriminatees During the Strike

24. In applying, and citing cases that apply, the *Burnup & Sims* and *Clear Pine Moldings* standards to this case. (ALJD p.13, lines 23-28.)

25. In finding that the four alleged discriminatees were "present during the strike, but did not cause the vehicular blockade of company operations," which "was already in place by the time the four discriminatees congregated in the middle of Paidge Avenue" (ALJD p.13, lines 35-38), instead of finding that the blockade was both vehicular and corporeal, and was thus constituted in part by the alleged discriminatees' bodily congregation in the middle of the street.

26. In finding "no credible evidence that any of the four discriminatees knew before arriving for the event that it ... would bring company operations to a halt," insofar as this suggests that the employees' knowledge prior to engaging in unlawful and unprotected conduct is relevant. (ALJD p.13, lines 38-41.)

27. In finding that "[u]nder the circumstances, the relatively passive participation of the four discriminatees at the strike location did not constitute misconduct." (ALJD p.13, lines 42-43.)

28. In failing to find that the events of April 2, 2014 constituted an unprotected mass picket, and that Time Warner Cable was entitled to discipline its participants, including the alleged discriminatees. (ALJD p. 13 line 44.)

29. In holding that participation in a mass picket must be "active" to justify discipline, on the basis of cases that did not involve blockades of facility ingress and egress. (ALJD p.14, lines 1-9.)

30. In holding that *Detroit Newspapers*, 342 N.L.R.B. 223 (2004), cited by Time Warner Cable, is distinguishable because "several disciplined employees actively intimidated and violently assaulted coworkers," whereas "the Board concluded that the employer did not have a good faith belief that [another] employee engaged in misconduct" by "blocking the view of a delivery truck that was backing out of the facility," where "surveillance video showed that the employee was not an active participant in blocking the truck driver's view." (ALJD p.14, lines 13-19.)

31. In failing to hold that *Detroit Newspapers* finds that employees engaged in serious misconduct justifying their discipline by "sit[ting] down in the street." (ALJD p.14, lines 13-19.)

32. In holding that *Kohler*, 128 N.L.R.B. 1062 (1960), cited by Time Warner Cable, is distinguishable because the "disciplined employees" there were "actively engaged in the picket lines that blocked access to the plant" by "position[ing] their bodies in order to block non-striking employees from entering the plant," whereas here, the "four discriminatees simply stood in the crowd and had no involvement in constructing the vehicular blockade of the Company's facility and operations." (ALJD p.14, lines 21-26.)

II. The Interrogations

33. In failing to find that a shop steward was present at all investigatory interviews. (ALJD p. 15, line 4.)

34. In mischaracterizing "company officials" as "rattl[ing] off questions" during meetings with employees. (ALJD p.15, lines 4-6.)

35. In finding that certain questions by Company representatives "went well beyond potential employee misconduct or involvement in the vehicular blockade by seeking to elicit employee knowledge about union activities." (ALJD p.15, lines 12-14.)

36. In holding that "[t]he totality of the circumstances established that the questions relating to employee knowledge about the organization of the April 2 event were coercive." (ALJD p.15, lines 19-20.)

37. In holding that "[s]ince everyone in the interview room knew about the union initiated activity ... , questions relating to communications and planning for the event reasonably conveyed the sense that the Company sought to unearth the employee's union activities, as well as the names of other employees involved with or sympathetic to the Union." (ALJD p.15, lines 27-30.)

38. In holding "coercive" the Company's "inquiry as to why the four discriminatees who were no scheduled to work that morning were at the event." (ALJD p.15, lines 30-35.)

39. In finding that asking employees "about their familiarity with the CBA and the no-strike clause reasonably tended to chill [their] future union activities." (ALJD p.15, lines 39-41.)

40. In finding that "[u]nder the circumstances, the Company interrogation of employees regarding the events of April 2 violated Section 8(a)(1) of the

Act." (ALJD p.15, lines 43-44.)

41. In failing to find that because the events of April 2, 2014 constituted an unprotected mass picket, Time Warner Cable was entitled to question its employees about their participation in it.

CONCLUSIONS OF LAW

42. In concluding that Respondent violated Section 8(a)(3) and (1) of the Act by suspending Ali, Andersen, Cabrera, and Tsavaris "because they engaged in protected union activity by participating in a work stoppage on April 2, 2014." (ALJD p.16, lines 9-11.)

43. In concluding that Respondent "coercively interrogated employees regarding the events of April 2, 2014 in violation of Section 8(a)(1) of the Act." (ALJD p.16, lines 13-14.)

44. In failing to conclude that the parties were contractually obligated to arbitrate this dispute, and that the Board must therefore defer to this obligation, withhold its processes, and dismiss this Complaint.

45. In failing to conclude that because the parties were contractually obligated to arbitrate this dispute and did in fact arbitrate it, the Board must defer to the arbitrator's findings in that arbitration.

46. In concluding that there were "aforementioned unfair labor practices" that affected commerce within the meaning of Sections 2(6) and (7) of the Act. (ALJD p.16, lines 16-17.)

REMEDY

47. In recommending the Remedy for those purported unfair labor practices included in the Conclusions of Law. (ALJD p. 16, lines 20-32.)

ORDER

48. In recommending the Order requiring cease and desist provisions with regard to the purported unfair labor practices in the Conclusions of Law, including in particular and without limitation, that Respondent cease and desist from "coercively interrogating any employee" and "[i]n any like or related manner interfering with, restraining, or coercing employees." (ALJD p.17, lines 1-4.)

49. In recommending the Order requiring the taking of any affirmative action relating to the purported unfair labor practices in the Conclusions of Law, including in particular and without limitation, that Respondent make employees Ali, Andersen, Cabrera, and Tsavaris whole for any loss of earnings or other benefits suffered as a result of the "discrimination against them"; remove from its files any reference to the "unlawful suspensions" of the four employees; preserve and provide to the Board all records "necessary to analyze the amount of backpay due" under the terms of the order; and post and electronically disseminate the "Appendix" to employees. (ALJD p.17, lines 6-39.)

50. In failing to recommend an Order dismissing the Consolidated Complaint in its entirety.

NOTICE TO EMPLOYEES

51. In recommending the Notice to Employees set forth in the Appendix to the Decision.

Dated: July 26, 2016, at New York, New York.

KAUFF MCGUIRE & MARGOLIS LLP
Attorneys for Respondent

By: _____*/s/ Kenneth A. Margolis*_____
Kenneth A. Margolis

CERTIFICATION OF SERVICE BY ELECTRONIC MAIL

The undersigned, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, that on July 26, 2016, he caused a true and correct copy of the attached Exceptions to the Administrative Law Judge's Decision on Behalf of Respondent/Employer Time Warner Cable New York City, LLC to be served upon counsel for the General Counsel (Allen M. Rose, Esq.) via electronic mail (Allen.Rose@NLRB.gov) and for the Charging Party (Robert McGovern, Esq., c/o Archer, Byington, Glennon & Levine LLP) via electronic mail (rmcgovern@abgllaw.com), pursuant to the Board's e-filing rules.

Dated: July 26, 2016 at
New York, New York

Kenneth A. Margolis
Kenneth A. Margolis

NATIONAL LABOR RELATIONS BOARD

---x

TIME WARNER CABLE OF NEW YORK CITY LLC,

Respondent,

-and-

Case 02-CA-126860

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Charging Party.

---x

EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE AND SUPPORTING BRIEF ON BEHALF OF CHARGING PARTY LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

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PRELIMINARY STATEMENT

This case principally involves Time Warner Cable of New York City LLC's (TWC) unlawful discipline of four bargaining unit employees for participating in the April 2, 2014 protest of the Company's unlawful suspensions of five employees the day before. Two of the discriminatees in this case (Ralf Andersen and Frank Tsavaris) were among the five individuals suspended on April 1, 2014. In fact, they were serving their suspensions when they participated in the protest. The other two discriminatees (Azeam Ali and Diana Cabrera) also were not scheduled to work on April 2, 2014. Even though none of the four were scheduled to work on April 2, they each were suspended for two weeks for engaging in a work stoppage, allegedly in violation of the no-strike clause contained in TWC's collective bargaining agreement (CBA) with IBEW Local 3 that expired a year earlier on March 31, 2013.

TWC defends its unlawful conduct primarily on two grounds. First, TWC claims that the protest constituted unprotected mass picketing. The second ground is that it was authorized to discipline the protesting employees based upon the no-strike clause in the expired CBA.

Administrative Law Judge Rosas correctly rejected both defenses. However, in rejecting the no-strike clause defense, the ALJ erred when he found that the clause survived expiration of the expired CBA by virtue of a Memorandum of Agreement (MOA) the parties executed on March 28, 2013, which the ALJ erroneously found constituted a free-standing agreement. As argued more fully below, TWC's no-strike clause defense fails as a matter of law based upon the Board's decision in Case 29-CB-125701, which held that no contract has been in effect since March 31, 2013. *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO*, 363 NLRB No. 30 (2015). In that case, the Board specifically rejected TWC's claim that the MOA constituted a free-standing agreement.

Indeed, in a subsequent a federal court proceeding where TWC sought to confirm and Local 3 sough to vacate an arbitration award relating to the April 2, 2014 work stoppage, the Board intervened and argued that "the Board's October 29, 2015 decision definitively resolving that no successor contract was reached between the parties in March 2013 should be given preclusive effect under both res judicata and collateral estoppel principles. As a result, the arbitration award cannot be confirmed." GC-40 (Board's Brief at 15). In that case, the district court judge deferred to the Board's holding that there was no contract and vacated that portion of the arbitration award that enjoined the Union from future violations of the no-strike clause.

As argued more fully below, given the Board's decision in Case 29-CB-125701 that there was "no meeting of the minds and no contract," 363 NLRB No. 30 at 18, the ALJ's finding in this case that the no-strike clause survived expiration of the CBA in March 2013 cannot stand.

STATEMENT OF RELEVANT FACTS

The April 2, 2014 Protest of TWC's Unfair Labor Practices

On April 1, 2014, TWC suspended a shop steward and four foremen, including Ralf Andersen and Frank Tsavaris, for refusing to accept tools, and refused to permit employees their right to Union representation in violation of their rights pursuant to *NLRB v. J. Weingarten, Inc.*, 420 U.S. 21 (1975). In response, the Union filed an unfair labor practice charge against TWC with the NLRB in Case 02-CA-125694, which settled in March 2015. GC-39 (Exhibit C – settlement documents).

On April 2, 2014, bargaining unit employees engaged in a "work stoppage to protest the April 1st suspension of four foremen for refusing to accept tools, the suspension of the shop steward and [TWC's] alleged violation of the employees' *Weingarten* rights." GC-39 (Exhibit B – letter from Office of Appeals upholding dismissal of TWC's charge against Local 3 alleging the April 2 protest violated the Act). TWC responded to the employees' protest, which took place on a public street outside the Company's Paidge Avenue facility, by interrogating bargaining unit employees identified by the Company through studying surveillance tapes as participants in the protest. Employees not scheduled to work that day at the Paidge Avenue facility, including the four discriminatees, were given two week suspensions. GC-4-7.

The written disciplinary notices TWC gave bargaining unit employees state that the protest was in violation of the no-strike clause contained in the parties' prior CBA. GC-4-7. In addition, prior to discipline being meted out, bargaining unit employees who participated in the April 2 protest were interrogated and specifically asked if they were aware of the no-strike clause. GC-14-17.

The Board's Decision In Case 29-CB-125701 holding that No CBA was in Effect on April 2, 2014

On October 29, 2015, the Board affirmed an April 28, 2015 decision of ALJ Steven Fish recommending dismissal of the complaint in Case 29-CB-125701, based upon TWC's charge against Local 3 for refusing to execute a successor collective bargaining agreement for the period April 1, 2013 to March 31, 2017. GC-2 (Board's decision in *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO*, 363 NLRB No. 30 (2015)).[1] In that case, the ALJ held that "there was no meeting of the minds and no contract" even though the parties signed a Memorandum of Agreement (MOA) on March 28, 2013. *Id.* at 18.

Along with its exceptions to ALJ Fish's decision, TWC filed a motion to reopen the record, arguing that "the parties intended that the terms of the MOA constituted a binding agreement between them." GC-35. The Board denied the motion in Footnote 1 of its decision:

> [TWC] moves to reopen the record to admit evidence that, after the hearing, [Local 3] filed notices of its intention to arbitrate grievances and "admitted" the existence of a collective bargaining agreement in arbitral and judicial filings. [TWC] contends that this evidence demonstrates that [Local 3] unlawfully refused to execute an agreed-upon contract. *Contrary to [TWC's] contention, [Local 3's] post hearing conduct shows only that [Local 3] mistakenly believed that the parties had reached agreement on March 28, 2013. It does not bear on the relevant question of whether the parties reached a meeting of the minds regarding all material terms of their successor contract.* (emphasis added).

Thus, the Board found that Local 3's invocation of the arbitration clause in the expired CBA established nothing more than that Local 3 "mistakenly believed that the parties had reached agreement on March 28, 2013." *Id.* As the Board noted, the Union's participation in those arbitrations "does not bear on the relevant question of whether the parties reached a

[1] TWC has not sought review of the Board's decision in a U.S. Court of Appeals. Tr. 46 ("It's still under consideration").

meeting of the minds regarding all material terms of their successor contract." *Id.* This finding undermines TWC's attempt to cabin the Board's decision as limited to the issue whether certain riders should have been included in a successor contract. Moreover, it undermines the ALJ's reliance on the MOA as the basis for his finding that the no-strike clause survived expiration of the CBA on March 31, 2013.

U.S. District Judge Weinstein's Decision Rejecting TWC's Claim that a CBA Was in Effect on April 2, 2014

Senior District Judge Jack Weinstein rejected TWC's claim that the no-strike clause was in effect in April 2014 when he vacated, in part, an arbitration award in favor of TWC. By way of background, following the April 2, 2014 protest at issue in this case, TWC sought a *Boy's Market* injunction. Judge Weinstein denied that application on May 5, 2014, at the close of TWC's case-in-chief and without Local 3 presenting any evidence. GC-41 (District Court Memorandum & Order (M&O), dated March 16, 2016). TWC also filed an arbitration demand and on November 30, 2015, the arbitrator issued a final award finding that Local 3 breached the no-strike clause. M&O at 18. The remedy awarded was $19,297.96 for TWC's alleged monetary damages and an injunction directing Local 3 not to engage in similar activity in the future. *Id.*

Significantly, when TWC moved to confirm the award, the Board intervened in support of Local 3 and argued that "the Board's October 29, 2015 decision definitively resolv[ed] that no successor contract was reached between the parties in March 2013 [and] should be given preclusive effect under both res judicata and collateral estoppel principles. As a result, the arbitration award cannot be confirmed." GC-40 (Board's Brief at 15). The Board went on to argue that its decision "found there to be no extant collective-bargaining agreement because there was no meeting of the minds in forming a new contract. The previous CBA having expired on March 31, 2013, the Board found that there was no contract between the parties during the

April 2, 2014 work stoppage. . . ." *Id.* at 17.

> The Board noted further in its brief:
>
> > TWC has argued to this Court that even if no successor contract was reached in March 2013, the duty to arbitrate the grievance over the April 2014 work stoppage continued (Dkt. 65 at 23, n.3), but this argument is plainly incorrect. Because the obligation to submit a dispute for final and binding arbitration can be created only by agreement, and not by operation of the Act, that obligation does not survive the expiration of a contract.

Id. at 18 (citing *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200-01 (1991)). As the Board observed, "[t]he *Litton* Court further recognized that no-strike clauses also do not survive expiration of the agreement. This expiration is attributable to the importance of protecting employees' statutory right to strike." *Id.* (citations omitted).[2]

On March 16, 2016, Judge Weinstein issued his M&O (GC-41), which provides in pertinent part:

> The court orders stricken from the final arbitral award the following sentence: "The Union is hereby explicitly directed not to engage in similar violations of the contractual 'no-strike' provisions in the future." The issue of future work stoppages was not presented to the arbitrator by the parties' specific arbitration agreement of July 24, 2014. *In addition, because the NLRB determined that there is no current CBA between the parties, this language concerning potential future actions by Local 3 or its members exceeds the arbitrator's authority.*

M&O at 39 (emphasis added). *See also* Judgment, dated March 31, 2016 (ECF No. 101) (confirming November 30, 2015 arbitration award "except that the language 'The Union is hereby explicitly directed not to engage in similar violations of the contractual "no-strike" provisions in the future' is stricken").

---

[2] In addition, Local 3 presented the district court with undisputed evidence that following issuance of ALJ Fish's decision in Case 29-CB-125701, it withdrew all pending arbitration demands based upon the ALJ's finding that there was no contract in effect after the CBA expired on March 31, 2013. *See Time Warner Cable of New York LLC v. IBEW Local 3*, EDNY Docket No. 14-cv-2437 (JBW), EFC Docket Entry No. 76 (Exhibit B: letters dated May 22, 2015, to arbitrators withdrawing eleven arbitration demands based on ALJ Fish's finding that no contract was in effect).

Thus, Judge Weinstein deferred to the Board's decision in Case 29-CB-125701, which found that there was no CBA in effect after March 2013.[3]

ALJ Rosas's Finding That the No-Strike Clause in the Expired CBA Was In Effect On April 2, 2014

At the hearing in this case on April 11-13, 2016, TWC recycled the same arguments that the Board and Judge Weinstein previously rejected. Tr. 29-35, 343. In fact, many of the exhibits, such as arbitration demands, annexed as exhibits to the Declaration of Kevin M. Smith, dated April 12, 2016 (R-20), were included with TWC's Motion to Reopen the Record (GC-35) in the prior Board case. Over the objections of Counsel for the General Counsel and Counsel for the Charging Party, the ALJ permitted TWC to introduce documentary evidence in support of its defense that the no-strike clause remained in effect notwithstanding the Board's decision in Case 29-CB-125701, which held that no contract has been in effect since March 31, 2013, and which rejected TWC's claim that "the parties intended that the terms of the [March 28, 2013] MOA constituted a binding agreement between them." GC-35.

In addition, as noted above in n. 2, Local 3 withdrew all pending arbitration demands based on the ALJ's finding that there was no contract in effect after the CBA expired on March 31, 2013. *See Time Warner Cable of New York LLC v. IBEW Local 3*, EDNY Docket No. 14-cv-2437, EFC No. 76 (letters to arbitrators withdrawing pending arbitration demands). *See also* Transcript of Proceeding, April 11, 2016 at 46-47:

> JUDGE ROSAS: The question I have for Charging Party [Union] is is it the Charging Party's contention that the expired contract in 2013? [sic] The previous

[3] Local 3 appealed the district court's confirmation of the arbitrator's award of monetary damages to the Second Circuit (Docket No. 16-1082(L)) and TWC cross-appealed the district court's vacation of the arbitrator's award of an injunction prohibiting future violations of the no-strike clause (Docket 16-1156(XAP)). On July 20, 2016, the Second Circuit denied the Board's motion to stay briefing until the Board issues its final decision in this case. *Time Warner Cable of New York City LLC v. IBEW Local 3*, 16-1082, ECF Docket Entry No. 65.

contract expired in 2013?
MR. MCGOVERN: Correct.
JUDGE ROSAS: That the status quo did not continue or did continue in any respect?
MR. MCGOVERN: The status quo is continuing but there is no contract.
JUDGE ROSAS: Right. Except with respect to wages, benefits and all of the terms, conditions and employment except for job actions?
MR. MCGOVERN: ***Arbitration*** --
JUDGE ROSAS: Was that in the previous agreement?
MR. MCGOVERN: The no strike clause?
JUDGE ROSAS: Yes.
MR. MCGOVERN: Well, sure, that's why we're here.
JUDGE ROSAS: Right. Okay. I just want to make sure I understand universe.
MR. MCGOVERN: ***And also the union hasn't arbitrated any disputes either***.
JUDGE ROSAS: I understand. . . . (emphasis added).

ALJ Rosas correctly rejected TWC's defenses that (1) the protest constituted unprotected mass picketing; and (2) it was authorized to discipline the protesting employees based upon the no-strike clause in the expired CBA. However, in rejecting the no-strike clause defense, the ALJ found that the clause survived expiration of the expired CBA by virtue of the March 28, 2013 MOA. ALJD at 11-13. It is this finding to which Local 3 files these exceptions.

EXCEPTIONS TO ALJ ROSAS'S FINDING THAT THE NO-STRIKE CLAUSE IN THE EXPIRED CBA WAS IN EFFECT ON APRIL 2, 2014

Exception No. 1

According to the ALJ, "[i]n denying the Company's motion to reopen the record to admit posthearing evidence of grievances filed by the Union, which allegedly constituted admissions that the Union unlawfully refused to execute an agreed-upon contract, the Board noted:

> The Charging Party contends that this evidence demonstrates that the [Company] **[sic]** unlawfully refused to execute an agreed-upon contract. Contrary to the [Company's] contention, the [Union's] posthearing conduct shows only that the [Company] **[sic]** mistakenly believed that the parties had reached agreement on March 28, 2013. It does not bear on the relevant question of whether the parties reached a meeting of the minds regarding all material terms of their successor contract.

ALJD at 4 (brackets in original).

This statement mischaracterizes TWC's motion to reopen the record in Case 29-CB-125701. First off, TWC's motion sought to introduce evidence, *inter alia*, of arbitration demands (not just grievances, which would have to be processed even absent a CBA) filed by the Union. GC-35. Second, and more importantly, the ALJ ignored the fact that TWC in its failed motion to reopen the record, specifically argued to the Board that the arbitration demands proved ***"the parties intended that the terms of the MOA constituted a binding agreement between them."*** (emphasis added). GC-35.

Exception No. 2

Another mischaracterization of the Board's decision in Case 29-CB-125701 by the ALJ is the statement:

> The Board provided further clarification as to why the Union did not violate Section 8(b)(3) of the Act by refusing to execute the successor CBA:
>
> [W]e find it unnecessary to pass on the judge's finding that the Charging

> Party's inclusion of the South Manhattan Rider in the copy of the contract it attached to its Federal district court complaint alleging a violation of the contractual no-strike clause constituted an admission that the Rider was part of the parties' agreement.

ALJD at 4-5 (quoting n. 2 of the Board's decision).

In this regard, the Board's statement that it found it unnecessary to consider TWC's inclusion of the Rider in a federal court filing in no way clarified why it adopted the ALJ's finding that the Union did not violate the Act. To the contrary, the statement in footnote 2 clearly means that the Board did not consider the federal court filing relevant to its determination.

Exception No. 3

Besides mischaracterizing the Board's decision in Case 29-CB-125701, the ALJ also mischaracterized the November 30, 2015 award of Arbitrator Brent. According to the ALJ, "[o]n November 30, 2015, Arbitrator Brent issued a final award and awarded the Company damages in the amount of $19,297.96." ALJD at 7. Conspicuously absent from the ALJ's description of the award is the fact that the arbitrator included in his award injunctive relief, which had been requested by TWC: "The Union is hereby explicitly directed not to engage in similar violations of the contractual 'no-strike' provisions in the future."

Exception No. 4

The omission identified in Exception No. 3 is all the more glaring when coupled with the ALJ's failure to address the fact that Judge Weinstein vacated the injunction portion of the arbitration award in the federal action in which the Board intervened and took the position that the no-strike clause did not survive expiration of the CBA notwithstanding the fact that the parties signed the MOA on March 28, 2013. *See* ALJD at 7 (section F. "The District Court Action" – omitting any reference to the Court's March 16, 2016 Memorandum and Order vacating, in part, the November 30, 2015 arbitration award).

Exception No. 5

According to the ALJ, "[i]t is the MOU and not the inability to agree to a successor CBA, which is dispositive with respect to the applicability of the no-strike clause to the events of April 2." ALJD at 12. This statement ignores the fact that the Board had rejected TWC's argument in its motion to reopen the record in Case 29-CB-125701 that "the parties intended that the terms of the MOA constituted a binding agreement between them." GC-35.

Exception No. 6

According to the ALJ:

> The parties bargained over the inclusion of Riders in a successor CBA. In the meantime, they continued to adhere to the *status quo ante*, with the exception of the Company's prompt implementation of the wage and benefits provisions of the MOU. This served as the Company's *quid pro quo* and evidence of the parties[']intent to continue applying certain terms and conditions of the expired CBA, such as the no-strike clause.

ALJD at 12. This statement is incorrect in three ways. First, as ALJ Fish found, the parties did not bargain over the inclusion of the Riders in a successor CBA. *See* 363 NLRB No. 30 at 11 ("[TWC witnesses] Smith, Haught, and Ciliberti testified that during these sessions, there was no discussion about inclusion of the riders from the prior agreements in the successor contract.").

Second, in stating that the *status quo ante* was maintained "with the exception of the Company's prompt implementation of the wage and benefits provisions of the MOU", the ALJ ignored the fact that after ALJ Fish's decision issued, the Union withdrew all pending arbitration demands. Thus, the true *quid pro quo* for a no-strike clause – arbitrating contractual disputes - is not present. Moreover, this statement by the ALJ completely ignores the Board's finding that the parties "mistakenly believed that [they] had reached agreement [on a successor CBA] on March 28, 2013" – the day they signed the MOA. 363 NLRB No. 30 at n.1. Furthermore, there is absolutely no evidence in the record "of the parties[']intent to continue applying certain terms

and conditions of the expired CBA, such as the no-strike clause." ALJD at 12. Indeed, the evidence in the record amply demonstrates that the Union's unwavering positon has been that the no-strike clause did not survive expiration of the CBA in March 31, 2013. Moreover, U.S. District Judge Weinstein agreed with the Union (and the Intervenor Board) when he stuck the following portion of the arbitration award: "The Union is hereby explicitly directed not to engage in similar violations of the contractual 'no-strike' provisions in the future." M&O at 39.

And third, in stating that TWC continued to maintain the *status quo ante* after the CBA expired, the ALJ overlooks the fact that employers are obligated to maintain the status quo until a new agreement is reached or the parties negotiate to a good faith impasse. Further, apparently lost on the ALJ is the fact that under well-established labor law principles, no-strike clauses are not part of the status quo that must be maintained.

Exception No. 7

The mischaracterizations and omissions detailed above in Exception Nos. 1-6 culminated in the ALJ's ultimate erroneous finding:

> In the instant case, however, the intention of the parties was reflected in the MOU, which incorporated certain provisions from the expired CBA, including the no-strike clause. The MOU constituted a clear continuation of the waiver of employees' rights set forth in the expired CBA. *See Provena Hosps., d/b/a Provena St. Joseph Med. Ctr. & Illinois Nurses Ass'n*, 350 NLRB 808, 812 (2007) (finding that the waiver of a statutory right has to be explicit as well as clear and unmistakable). Therefore, the no-strike clause, which remained in effect on April 2, prohibited the four discriminatees from the "cessation or stoppage of work, service or employment on April 2.

ALJD at 13.

Again, the ALJ failed to apply the Board's decision in Case 29-CB-125701, where, in denying TWC's motion to reopen the record, the Board clearly rejected TWC's argument that "the parties intended that the terms of the MOA constituted a binding agreement

between them." GC-35. Thus, the MOA did not "constitute[] a clear continuation of the waiver of employees' rights set forth in the expired CBA." ALJD at 13. Rather, as the Board found, it proves only that the parties "mistakenly believed that [they] had reached agreement [on a successor CBA] on March 28, 2013." 363 NLRB No. 30 at n.1.

Simply put, because the Board has already held that the parties did not reach a meeting of the minds on a successor agreement, the ALJ's finding that the MOA constitutes a successor agreement is inconsistent with and cannot be reconciled with the Board's controlling decision in Case 29-CB-125701.

ARGUMENT IN SUPORT OF EXCEPTIONS

THE ALJ'S FINDING THAT THE NO-STRIKE CLAUSE IN THE EXPIRED CBA REMAINED IN EFFECT IS PRECLUDED BY THE BOARD'S DECISION IN CASE 29-CB-125701

On October 29, 2015, the Board issued its decision in Case 29-CB-125701 "definitively resolving that no successor contract was reached between the parties in March 2013." GC-40 (Board's Federal Court Intervention Brief at 15). Indeed, the Board's brief to Judge Weinstein leaves no doubt whatsoever concerning the breadth of its decision in the CB case:

> The central issue of whether a valid contract was in place on April 2, 2014, was presented before the ALJ, the Board, and finally, the arbitrator. Although both parties were initially operating under the assumption that a renewed CBA was in effect, the facts presented before the ALJ pointed to a series of disagreements over riders and an electrical engineering provision that were material in renewal of the contract. Here, despite the arbitrator's disavowal of his jurisdiction to decide whether a successor contract was reached, his award of contractual damages rests squarely upon the prerequisite that a contract was formed. Thus, the existence of that contract was at issue in both proceedings, that issue was actually litigated and decided before the Board, TWC had a full and fair opportunity to litigate the issue, and resolution of that issue was necessary to the Board's decision dismissing the Section 8(b)(3) complaint. Therefore, this issue has been determined conclusively by the Board.

GC-40 (Brief at 17).

Although not bound to the Board's decision, Judge Weinstein deferred to that decision when he struck that portion of the arbitrator's remedy enjoining further work stoppages. GC-41 (M&O at 39).

In this case, ALJ Rosas was bound by the Board's decision in 29-CB-125701. *See Waco, Inc.*, 273 NLRB 746, 749 n.14 (1984) (ALJs are bound to follow Board precedent which neither the Board nor the Supreme Court has reversed). Accordingly, the ALJ erred by allowing TWC's attempt to relitigate the CB case and compounded his error by ruling that the MOA constituted a free-standing agreement that "constituted a clear continuation of the waiver of the employees'

rights [to strike] set forth in the expired CBA." ALJD at 13.

Simply put, because the Board held that there was no contract after March 2013, it follows that the no-strike clause in the expired agreement lacked any force or effect because no-strike clauses do not survive the expiration of a CBA. *Litton Fin. Printing Div. v. NLRB,* 501 U.S. 190, 199 (1991). As the Supreme Court explained, "an expired contract has, by its terms, released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied." *Id.* at 206. *See also Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22, 25-27 (2d Cir. 1988) ("[T]he CBA must be considered defunct upon its expiration for all purposes except the status quo. . . .").

The ALJ's finding that the no-strike clause in the expired CBA remained in effect notwithstanding the Board's decision in Case 29-CB-125701 is totally at odds with and cannot be reconciled with that prior Board decision. Although parties may specifically agree in writing to have a no-strike clause remain in effect during contract negotiations, TWC presented no evidence that such an agreement was made in this case, either orally or in writing. Moreover, TWC's argument is based on the false premise that the MOA the parties signed in March 2014 is a standalone agreement. In the prior Board case, TWC argued in its motion to reopen the record (GC-35 at 2) that "the parties intended that the terms of the MOA constituted a binding agreement between them." The Board rejected this argument in Footnote 1 of its decision (GC-2):

> TWC] moves to reopen the record to admit evidence that, after the hearing, [Local 3] filed notices of its intention to arbitrate grievances and "admitted" the existence of a collective bargaining agreement in arbitral and judicial filings. [TWC] contends that this evidence demonstrates that [Local 3] unlawfully refused to execute an agreed-upon contract. *Contrary to [TWC's] contention, [Local 3's] post hearing conduct shows only that [Local 3] mistakenly believed that the parties had reached agreement on March 28, 2013. It does not bear on the relevant question of whether the*

parties reached a meeting of the minds regarding all material terms of their successor contract. (emphasis added).

Because the Board has already rejected the argument that the MOA constitutes a binding agreement, TWC's attempt to revive the argument in this case should have been rejected by the ALJ. As the Board clearly stated in its brief intervening in the federal court action before Judge Weinstein, the no-strike clause did not survive the expiration of the 2009-13 CBA and, therefore, cannot preclude Local 3 or the TWC bargaining unit employees from engaging in a strike. GC-40 (Board's Brief at 17: "[T]he Board found there to be no extant collective-bargaining agreement because there was no meeting of the minds in forming a new contract. The previous CBA having expired on March 31, 2013, the Board found that there was no contract between the parties during the April 2, 2014 work stoppage. . . .").

Moreover, the record in Case 29-CB-125701, of which the Board may take administrative notice, reveals that in the transcript of proceedings, TWC General Counsel and Chief Negotiator Kevin Smith admitted that the no-strike clause (as well as many other provision in the expired CBA) was not discussed during negotiations in 2013. *See* Transcript (Oct. 1, 2014) at 67 ("*Q:* Section 31, cessation or stoppage of work, no discussions during bargaining in 2013, right? *A:* No, there were not."). *See also* 363 NLRB No. 30 at 12-13 (listing 27 sections in the expired contract that were not discussed during negotiations).

The ALJ recognized that the waiver of a statutory right, such as the right to strike, "must be explicit as well as clear and unmistakable." ALJD at 13 (quoting *Provena Hosps., d/b/a Provena St. Joseph Med, Ctr. & Illinois Nurses Ass'n*, 350 NLRB 808, 812 (2007)). However, in this case, evidence of such an explicit, clear and unmistakable waiver is totally lacking given the undisputed fact that the parties never discussed the no-strike clause during their negotiations for a successor CBA in 2013.

At bottom, the fact that TWC paid wage and benefit increases pursuant to the MOA shows only that TWC (like Local 3) "mistakenly believed that the parties had reached agreement on March 28, 2013. It does not bear on the relevant question of whether the parties reached a meeting of the minds regarding all material terms of their successor contract." 363 NLRB No. 30 at n.1.

In sum, in view of the Board's decision in Case 29-CB-125701, the ALJ erred in finding that the MOA constituted a free-standing agreement that contains an enforceable no-strike clause.

CONCLUSION

For all these reasons, the Board is urged to (1) reject the ALJ's finding that the no-strike clause in the expired CBA remained in effect on April 1, 2013 by virtue of the MOA; and (2) adopt the ALJ's decision in all other respects with respect to his finding that TWC violated the Act by disciplining strikers and interrogating employees concerning their protected activities.

Dated: Melville, New York
July 26, 2016

Respectfully submitted,
By: */s/ Robert T. McGovern*
Robert T. McGovern
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AFFIDAVIT OF SERVICE BY E-MAIL

I certify that on July 26, 2016, I served the foregoing **EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE AND SUPPORTING BRIEF ON BEHALF OF CHARGING PARTY LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO**
upon:

Kenneth Margolis
Counsel for Charged Party/Respondent
Time Warner Cable of New York LLC
margolis@kmm.com

Allen Rose
Counsel for the General Counsel
Allen.Rose@nlrb.gov

by e-mail addressed to said parties at the e-mail addresses above set forth, being the addresses designated by said parties for that purpose.

Linda Ormsby

Sworn to before me this
26th day of July, 2016

Notary Public

DINA L. DIX
Notary Public, State of New York
No. 01DI5088007
Qualified in Suffolk County
Commission Expires Nov. 10, 2017

751175

A-580

United States Government

OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570

August 4, 2016

Re: Time Warner Cable New York City, LLC
Case 02-CA-126860

EXTENSION OF TIME TO FILE ANSWERING BRIEF TO EXCEPTIONS

The request for extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of Answering Brief to Exceptions is extended to **August 16, 2016**. This extension applies to all parties. The due date for filing Cross Exceptions remains August 9, 2016.

/s/ Roxanne L. Rothschild
Deputy Executive Secretary

cc: Parties
Region

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278-0104

Telephone: 212-264-0300
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February 8, 2017

(By E-filing)
Hon. Gary W. Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: Time Warner Cable New York City LLC
Case No. 02-CA-126860

Dear Mr. Shinners:

In the General Counsel's Motion to Expedite Decision filed on December 4, 2016, Counsel for the General Counsel moved the Board to hear the above-referenced case on an expedited basis in light of the pendency of a related matter before the Second Circuit involving the Board, the Charging Party, and the Respondent.

Counsel for the General Counsel writes to inform the Board that the Second Circuit has scheduled oral argument for March 22, 2017, in the related case.

Sincerely,

Allen M. Rose
Counsel for the General Counsel

cc: Robert T. McGovern, Esq. (by email)
Counsel for the Charging Party

Kenneth A. Margolis, Esq. (by email)
Counsel for the Respondent

A-582

FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIME WARNER CABLE NEW YORK CITY, LLC

and **Case 02-CA-126860**

LOCAL UNION NO. 3 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Date of Mailing: February 8, 2017

AFFIDAVIT OF SERVICE OF: LETTER FROM COUNSEL FOR THE GENERAL COUNSEL DATED FEBRUARY 8, 2017.

I, the undersigned employee of the National Labor Relations Board, state under oath that, on the date indicated above I served the above-entitled document(s) by electronic mail (email), as indicated below, upon the following persons, addressed to them at the following addresses:

By eFiling
National Labor Relations Board
Office of the Executive Secretary
Attn: Gary Shinners, Executive Secretary

By Email
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Robert T. McGovern
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Melville, New York 11747-9064
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February 8, 2017 .
Date

Allen M. Rose Board Agent
Print Name Title

Signature

A-583

KM&M
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NEW YORK
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April 3, 2017

VIA NLRB E-FILING

Mr. Gary Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Re: Time Warner Cable New York City LLC
Case 02-CA-126860
KM&M File No. 08318.8285

Dear Mr. Shinners:

We represent Respondent Time Warner Cable New York City LLC in the above-referenced case that is pending before the Board for decision.

Pursuant to Section 102.6 Board's Rules and Regulations, Respondent directs the Board's attention to the recent decision (copy enclosed) of the United States Court of Appeals for the Second Circuit in *Time Warner Cable of New York City LLC vs. IBEW Local 3*, 2017 U.S. App. LEXIS 5356, Docket Nos. 16-1082-cv (L) and 16-1156-cv (XAP), March 28, 2017, in which the Board had intervened.

In the case before the Board, the parties disagree as to whether a collective bargaining agreement (and, more specifically, its no-strike provision) has been in effect since March 31, 2013. Now, however, the Second Circuit has resolved that dispute, ruling that the no-strike obligation of the parties' 2009-13 agreement was reincorporated in the new agreement reached on March 28, 2013, which expires on March 31, 2017.

The Court stated, in relevant part:

> The Union [Local 3] maintains that confirmation of the [arbitrator's] damages award violates federal public policy in favor of its members' right

KM&M
KAUFF McGUIRE & MARGOLIS LLP

> to strike.... A union, however, may waive that right.... It [Local 3] did so here it its 2009 CBA, and **that waiver was incorporated in the 2013 CBA**.
>
> ***
>
> ... **The CBA** to which the [arbitrator's] decision relates **is scheduled to expire on March 31, 2017**, in any event.

2017 U.S. App. LEXIS 5356 at *3, and, *7 fn.2 (emphasis supplied).

The Court's finding that the parties entered into a complete collective bargaining agreement, including a no-strike clause, in 2013 is binding on all parties and is conclusive in the present case before the Board.

Copies of this letter have been served via electronic mail on counsel for all parties.

Very truly yours,

Kenneth A. Margolis

Enclosure

CC: Allen M. Rose, Esq., Counsel for the General Counsel (Allen.Rose@NLRB.gov).
Robert McGovern, Esq., Counsel for the Charging Party (rmcgovern@abgllaw.com).

16-1082-cv (L)
Time Warner Cable of N.Y.C. LLC v. Int'l Bhd. of Elec. Workers

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of March, two thousand seventeen.

PRESENT: REENA RAGGI,
DENNY CHIN,
SUSAN L. CARNEY,
Circuit Judges.

TIME WARNER CABLE OF NEW YORK CITY LLC,
Plaintiff-Appellee-Cross-Appellant,

v.

Nos. 16-1082-cv (L)
16-1156-cv (XAP)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFLCIO, LOCAL UNION NO. 3,
Defendant-Appellant-Cross-Appellee,

NATIONAL LABOR RELATIONS BOARD,
Intervenor-Defendant-Cross-Appellee,

DEREK JORDAN, individually and in his capacity as Business Agent of Local 3,
Defendant.

APPEARING FOR PLAINTIFF-APPELLEE-CROSS-APPELLANT:	KENNETH A. MARGOLIS, Kauff McGuire & Margolis LLP, New York, New York.
APPEARING FOR DEFENDANT-APPELLANT-CROSS-APPELLEE:	MARTY G. GLENNON, Archer, Byington, Glennon & Levine LLP, Melville, New York.
APPEARING FOR INTERVENOR-DEFENDANT-CROSS-APPELLEE:	SARAH POSNER, Trial Attorney (Richard F. Griffin, Jr., General Counsel, Jennifer Abruzzo, Deputy General Counsel, Barbara O'Neill, Associate General Counsel, Nancy E. Kessler Platt, Deputy Associate General Counsel, William G. Mascioli, Assistant General Counsel, Dawn L. Goldstein, Deputy Assistant General Counsel, Kevin P. Flanagan, Supervisory Attorney, *on the brief*), National Labor Relations Board, Washington, D.C.

Appeal from a judgment of the United States District Court for Eastern District of New York (Jack B. Weinstein, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on March 31, 2016, is AFFIRMED.

Defendant International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 3 (the "Union") here appeals from so much of a judgment as confirmed an arbitral award of money damages to plaintiff Time Warner Cable of New York City LLC ("TimeWarner") for what the arbitrator found to be the Union's violation of the no-strike provision in the parties' 2013 collective bargaining agreement ("CBA"). TimeWarner cross-appeals the district court's vacatur of that part of the arbitral award prohibiting future strikes. On appeal from the confirmation or vacatur of an arbitral award under Section 301 of the Labor Management Relations Act ("LMRA"), *see* 29 U.S.C. § 185, we review the district court's legal conclusions *de novo* and its factual findings for clear

error, *see National Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 536 (2d Cir. 2016). We assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

1. Subject-Matter Jurisdiction

Relying on a 2015 National Labor Relations Board ("NLRB") decision as deeming the CBA here at issue unenforceable, the Union contends that there was no contract over which the district court could exercise subject-matter jurisdiction under the LMRA. *See* 29 U.S.C. § 185(a) (conferring subject-matter jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization"). The argument is at odds with the Union's own jurisdictional statement to this court, which states that "[t]he District Court had jurisdiction under 28 U.S.C. § 1331 and . . . 29 U.S.C. § 185 *et seq.*" Def.-Appellant's Br. at 2. The point merits little discussion in any event because the purported invalidity of the CBA is an "affirmative defense" that the district court was empowered to adjudicate "consistent with [LMRA] § 301(a)," not a jurisdictional defect. *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, Agric. Implement Workers of Am., Int'l Union*, 523 U.S. 653, 658 (1998). Thus, the district court properly exercised subject-matter jurisdiction here.

2. Public Policy

The Union maintains that confirmation of the damages award violates federal public policy in favor of its members' right to strike. *See National Labor Relations Bd.*

v. Starbucks Corp., 679 F.3d 70, 77 (2d Cir. 2012) (stating that National Labor Relations Act guarantees employees' "right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (quoting 29 U.S.C. § 157)). A union, however, may waive that right. *See Mastro Plastics Corp. v. Nat'l Labor Relations Bd.*, 350 U.S. 270, 279–80 (1956); *accord National Labor Relations Bd. v. G & T Terminal Packaging Co., Inc.*, 246 F.3d 103, 110 n.7 (2d Cir. 2001). It did so here in its 2009 CBA, and that waiver was reincorporated in the 2013 CBA.

The Union contends that the 2013 waiver is without force because (1) the NLRB later concluded that TimeWarner and the Union had reached no "meeting of the minds" as to the 2013 CBA, J.A. 427; and (2) in any event, the no-strike clause did not cover orderly protests of unfair labor practices. The first argument fails because, as the district court found, the Union waived it by (1) expressly asking the arbitrator to determine its liability under the no-strike clause of the 2013 CBA, and (2) lodging no challenge to the CBA until 5 months after the arbitrator issued an adverse interim award. *See Sokolowski v. Metro. Transp. Auth.*, 723 F.3d 187, 191 (2d Cir. 2013) (stating that party's "participat[ion] in arbitration proceedings without making a timely objection" may evince waiver of right to object to arbitrator's authority (internal quotation marks omitted)); *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 368 (2d Cir. 2003) ("If a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the

matter . . . [unless he] clearly and explicitly reserves the right to object to arbitrability . . . ." (quoting *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000)).

The Union's second challenge also fails because no-strike provisions in collective bargaining agreements are generally enforceable. *See Metropolitan Edison Co. v. Nat'l Labor Relations Bd.*, 460 U.S. 693, 705 (1983). Insofar as the Union objects that the clause cannot preclude an orderly protest in response to an unfair labor practice, whether the Union engaged in such a strike was a merits question before the arbitrator, not the district court, which could vacate the arbitrator's award on public policy grounds only if the award created an "explicit conflict with other laws and legal precedents." *New York City & Vicinity Dist. Council v. Ass'n of Wall-Ceiling and Carpentry Indus. of N.Y., Inc.*, 826 F.3d 611, 618 (2d Cir. 2016) (internal quotation marks omitted); *National Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d at 536 (stating that "courts are not permitted to substitute their own" judgment for that of arbitrator). No such conflict is apparent here. The arbitrator found—based upon video evidence—that union members were not in fact orderly because they had blocked vehicular access to TimeWarner's facility, which accords with the NLRB's "consistent[]" conclusion "that the blocking of access to an employee's workplace constitutes unlawful restraint and coercion" in violation of the LMRA. *International Bhd. of Elec. Workers, Local Union No. 98 & Tri-M Grp., LLC*, 350 N.L.R.B. 1104, 1107 (2007).

We, therefore, affirm the district court's confirmation of the arbitrator's award of money damages to TimeWarner.

3. Prohibition Against Future Strikes

On cross-appeal, TimeWarner challenges the vacatur of that portion of the arbitral award directing the Union "not to engage in similar violations of the contractual 'no-strike' provision in the future."[1] S.A. 41. We identify no error in the district court's decision on this matter because the questions presented to the arbitrator did not address disputes as to future violations of the no-strike provision.

In the labor-management context, an arbitrator is bound by both "the CBA and the questions submitted by the parties for arbitration," and the limitations on his authority "generally depend[] on the intention of the parties." *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 527 (2d Cir. 2005) (internal quotation marks omitted). The parties here asked the arbitrator to answer only two questions—(1) Whether the Union "violate[d] the no-strike provision" of the CBA during the April 2, 2014 strike; and (2) "[i]f so, what shall be the remedy?"—neither of which explicitly empowered the arbitrator to address matters relating to further strikes, as opposed to the strike that had already occurred. J.A. 527. While the parties could have agreed to submit to the arbitrator such matters as were likely to arise in connection with future strikes, the record demonstrates that no such agreement existed here. *See 187 Concourse Assocs. v. Fishman*, 399 F.3d at 526–27 (concluding, where arbitrator was asked (1) "Was the Grievant discharged for just cause?" and (2) "If not, what shall the remedy be?" that power to award remedies was limited by first question). This is particularly so where the arbitrator acknowledged that

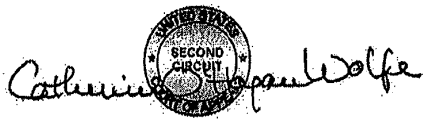
[1] The NLRB intervenes solely to defend the district court's decision in this regard.

the only dispute before him related to the "events of April 2, 2014," and that other conflicts with the union would "fall outside the scope of the grievance that is before the Arbitrator in the instant case." J.A. 356–57. Accordingly, we affirm the district court's decision to strike so much of the arbitral award as "explicitly directed" the Union "not to engage in similar violations of the contractual 'no-strike' provisions in the future."[2] S.A. 41.

4. Conclusion

We have considered the parties' other arguments and conclude that they are without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



[2] Because we have concluded that the Union waived its challenges to the 2013 CBA for purposes of the arbitration presented here, and that the question of future strikes was not submitted to the arbitrator, we need not address the effect of the 2015 NLRB decision. The CBA to which the decision relates is scheduled to expire on March 31, 2017, in any event.

United States Government

NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET, SE
WASHINGTON DC 20570

April 5, 2017

Robert T. McGovern
Archer, Byington, Glennon & Levine LLP
One Huntington Quadrangle, Suite 4C10
P.O. Box 9064
Melville, NY 11747

Re: *Time Warner Cable New York City LLC*
02-CA-126860

Dear Mr. McGovern:

This letter acknowledges receipt of the Union's response to the Respondent's April 3, 2017 letter, which brings to the Board's attention the court's recent decision in *Time Warner Cable of New York City LLC v. IBEW Local 2*, 2017 U.S. App. LEXIS 5356 (March 29, 2017).

Under Section 102.6 of the Board's Rules and Regulations, a party may bring to the Board's attention, via letter, pertinent and significant authorities that come to a party's attention after the party's brief has been filed. The body of the letter must not exceed 350 words. Any response to such letter must be "similarly limited." Here, the Union's response exceeds the word count restriction. Accordingly, the response will not be submitted to the Board.

Should the Union wish to conform and re-file its response, it may do so by April 17, 2017.

Very truly yours,

/s/ Farah Z. Qureshi
Associate Executive Secretary

cc: Parties

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April 6, 2017

By NLRB E-Filing

Gary Shinners, Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Re: *Time Warner Cable New York City LLC*
Case 02-CA-126860
Our File No. 25182.11

Dear Mr. Shinners:

On behalf of Charging Party Local 3, I write in response to Respondent's April 3 letter misrepresenting the Second Circuit's holding in *Time Warner Cable of New York City LLC v. IBEW Local 3*, Docket 16-1082-cv (March 28, 2017) regarding Local 3's waiver during an arbitration concerning of the existence of a CBA, as being "binding on all parties and [] conclusive in the present case before the Board." Respondent's Letter at 2.

Contrary to Respondent's shameless distortion of the decision, the Circuit did not hold that "the parties' entered into a complete [CBA], including a no-strike clause, in 2013…." As the decision, at footnote 2, makes clear: "Because we have concluded that the Union waived its challenges to the 2013 CBA ***for purposes of the arbitration presented here***, and the question of future strikes was not submitted to the arbitration, we need not address the effect of the 2015 NLRB decision." (emphasis added). In that case, the Circuit affirmed the district court decision, which deferred to the Board's holding that there was no contract and vacated that portion of the arbitration award enjoining the Union from future violations of the no-strike clause in the expired CBA. *See Local Union No. 3*, 363 NLRB No. 30 (2015).

The Circuit's decision, which dealt only with the enforcement of an arbitration award, does not bind the Board. The Court's explicit statement that it was ***not*** addressing the 2015 Board Decision's holding that there was "no meeting of the minds and no contract" (Slip op. at 18) forecloses Respondent's attempt to expand the scope of the Circuit's decision to the point of precluding the Board's authority to decide this case.

All that "is binding on all parties and is conclusive in the present case before the Board" is the 2015 Board Decision. Significantly, Respondent still has not sought review of that decision in a Court of Appeals, presumably because it realizes the futility of appealing the well-reasoned decision. Accordingly, the Board's 2015 Decision holding that there "was no meeting of the minds and no contract" remains both controlling and dispositive.

Respectfully submitted,
/s/ Robert T. McGovern
Robert T. McGovern

RTM:am

cc: Allen M. Rose, Esq., Counsel for the General Counsel (By email: Allen.Rose@NLRB.gov)
Kenneth A. Margolis, Esq., Respondent's Counsel (By email: Margolis@kmm.com)

754168.2

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I certify that on April 6, 2017, I served the foregoing **RESPONSE TO RESPONDENT'S APRIL 3, 2017 LETTER** fully executed by counsel for the parties in Case 02-CA-126860, upon:

Allen M. Rose, Esq.
Counsel for the General Counsel
E-mail: Allen.Rose@NLRB.gov

Kenneth A. Margolis, Esq.
Counsel for Respondent
E-mail: Margolis@kmm.com

by e-mail addressed to said parties at the e-mail addresses above set forth, being the addresses designated by said parties for that purpose.

/s/ Robert T. McGovern
Robert T. McGovern

United States Government
NATIONAL LABOR RELATIONS BOARD
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April 12, 2017

(By E-filing)
Hon. Gary W. Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: Time Warner Cable New York City LLC
Case No. 02-CA-126860

Dear Mr. Shinners:

Pursuant to Section 102.6 of the Board's Rules and Regulations, Counsel for the General Counsel responds to Respondent's notice of supplemental authority discussing *Time Warner Cable of New York City LLC v. IBEW Local 3*, No. 16-1082, 2017 WL 1163302 (2d Cir. Mar. 28, 2017). Based on the pendency of that case, Counsel for the General Counsel, on December 4, 2016, filed a Motion to Expedite Decision with the Board; and, on February 8, 2017, Counsel for the General Counsel informed the Board by letter that the Second Circuit had scheduled oral argument for March 22, 2017.

On March 28, 2017, the Second Circuit affirmed the district court's judgment in full, thereby rendering the Motion to Expedite moot.

In its April 3, 2017 notice of supplemental authority, Respondent takes the untenable position that the Second Circuit made a "binding" and "conclusive" finding that the no-strike provision contained in the parties' 2009-2013 collective-bargaining agreement was reincorporated in a new, four-year agreement reached on March 28, 2013. Contrary to Respondent's assertion, the court of appeals specifically *declined* to make a finding on the effect of the Board's decision in *Electrical Workers, Local Union No. 3*, 363 NLRB No. 30, slip op. at 18 (2015), which had fully upheld the Administrative Law Judge's finding that "there was no meeting of the minds and no contract" after the expiration of the parties' 2009-2013 agreement. Instead, the Second Circuit concluded that the Union had waived its ability to challenge the validity of the purported successor agreement only with respect to the arbitration at issue in that case:

> Because we have concluded that the Union waived its challenges to the 2013 CBA *for purposes of the arbitration presented here*, and that the question of future strikes was not submitted to the arbitrator, *we need not address the effect of the 2015 NLRB decision.*

2017 WL 1163302, at *2 n.2 (emphasis added).

Therefore, nothing in the Second Circuit's decision requires the Board to abandon its prior finding that there was no contract in effect between the parties after March 31, 2013.

Sincerely,

Allen M. Rose
Counsel for the General Counsel

cc: Robert T. McGovern, Esq. (by email)
Counsel for the Charging Party

Kenneth A. Margolis, Esq. (by email)
Counsel for the Respondent

A-598

FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIME WARNER CABLE NEW YORK CITY, LLC

and **Case 02-CA-126860**

LOCAL UNION NO. 3 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Date of Mailing: April 12, 2017

AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S LETTER TO THE EXECUTIVE SECRETARY DATED APRIL 12, 2017

I, the undersigned employee of the National Labor Relations Board, state under oath that, on the date indicated above I served the above-entitled document(s) by electronic mail (email), as indicated below, upon the following persons, addressed to them at the following addresses:

By eFiling
National Labor Relations Board
Office of the Executive Secretary
Attn: Gary Shinners, Executive Secretary

By Email
Kenneth A. Margolis
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margolis@kmm.com

By Email
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Archer, Byington, Glennon & Levine, LLP
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rmcgovern@abgllaw.com

April 12, 2017 .
Date

Allen M. Rose Board Agent
Print Name Title

Signature

KM&M
KAUFF McGUIRE & MARGOLIS LLP

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February 20, 2018

VIA NLRB E-FILING

Mr. Gary Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Re: Time Warner Cable New York City LLC
Case 02-CA-126860
KM&M File No. 08318.8253

Dear Mr. Shinners:

We represent Respondent Time Warner Cable New York City LLC in the above-referenced case that is pending before the Board for decision.

Pursuant to Section 102.6 Board's Rules and Regulations, Respondent directs the Board's attention to the recent decision (copy enclosed) of the United States District Court for the Eastern District of New York in *International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 3 v. Charter Communications, Inc.*, 17-cv-5357 (February 16, 2018).

In the case before the Board, the parties disagree as to whether a no-strike provision has been in effect since March 31, 2013. The Administrative Law Judge ruled that it was and the General Counsel has excepted to that ruling. Now, the federal court has resolved the parties' dispute, ruling that the grievance and arbitration and no-strike obligation of the parties' 2009-13 agreement continued in effect through March 31, 2017. On that basis, the Court denied Local 3's application to stay an arbitration initiated by Charter over Local 3's violation of the no-strike obligation on March 28, 2017.

The Court stated, in relevant part: "The parties' action in signing the [March 28, 2013] MOA, and their continued conduct, in following its primary terms, indicates that the parties intended to be bound by the no-strike and grievance

KM&M
KAUFF McGUIRE & MARGOLIS LLP

provisions. [citations omitted]" and that, consequently "the parties were bound by the no-strike, grievance and arbitration provisions of the new CBA." Charter respectfully submits that this finding is conclusive with respect to the General Counsel's exceptions in the present case before the Board.

Copies of this letter have been served via electronic mail on counsel for all parties.

Very truly yours,

Kenneth A. Margolis

Enclosure

CC: Allen M. Rose, Esq., Counsel for the General Counsel (Allen.Rose@NLRB.gov).
Robert McGovern, Esq., Counsel for the Charging Party
(rmcgovern@abgllaw.com).

A-601

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL UNION NO. 3,

Petitioner,

– against –

CHARTER COMMUNICATIONS, INC.,

Respondent.

MEMORANDUM & ORDER

17-CV-5357

Appearances:

International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 3:

Robert T. McGovern
Alexandra Howell
John H. Byington, III
Marty Gerard Glennon
Archer Byington Glennon & Levine LLP
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Charter Communications, Inc.:

Kenneth Alan Margolis
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New York, NY 10022

Table of Contents

JACK B. WEINSTEIN, Senior United States District Judge:

I. Introduction

This action is a continuation of the litigation between International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 3 ("Local 3") and the employer of its members, Charter Communications, Inc. ("Charter"). *See e.g. International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 3 v. Charter Communications Inc.*, No. 17-CV-5357, 2017 WL 4280591, at *1 (E.D.N.Y. Sept. 25, 2017); *Time Warner Cable of New York City LLC v. Int'l Bhd. of Elec. Workers*, 170 F. Supp. 3d 392, 398 (E.D.N.Y. 2016), *judgment entered*, No. 14-CV-2437, 2016 WL 1317402 (E.D.N.Y. Mar. 31, 2016), *aff'd sub nom. Time Warner Cable of New York City LLC v. Int'l Bhd. of Elec. Workers, AFL-CIO, Local Union No. 3*, 684 F. App'x 68 (2d Cir. 2017).

Thousands of union members are employed by Charter in the New York metropolitan area to install and service consumer televisions.

The question is whether Local 3 members were bound by a provision in a Collective Bargaining Agreement ("CBA") requiring arbitration of disputes on March 28, 2017, when they were allegedly on strike?

The parties agree that on March 31, 2017, the no-strike obligation was not in force, so the contested strike period up for arbitration on claimed damages by Charter is three days.

The following uncontested facts establish the existence of a binding agreement mandating arbitration of any dispute prior to March 31, 2017: (1) the parties signed a Memorandum of Agreement ("MOA"), on March 28, 2013, to extend the then in force CBA to March 31, 2017; (2) Local 3 ratified the agreement (the new CBA) by unanimous vote of its 1,300 members; (3) after ratification, the union accepted improved wages and benefits provided as part of the new CBA; and (4) for two years both parties continued to resolve grievances through the arbitration procedures in the new CBA.

Summary judgment is granted in favor of Charter. The no strike and grievance provisions in the new CBA are enforceable. Arbitration is ordered.

II. Facts

A. The Original Collective Bargaining Agreement

From April 1, 2009 to March 31, 2013, Local 3 and Time Warner Cable (recently purchased by, and referred to, as "Charter") were parties to a CBA. *International Brotherhood of Electrical Workers*, 17-CV-5357, 2017 WL 4280591, at *1. The agreement covered employees at Charter's six locations: Bergen County, Southern Manhattan, Northern Manhattan, Brooklyn, Queens, and Staten Island (collectively the "Tri-State facilities").

The original CBA governed the dispute resolution process—including arbitration:

> Section 24 of the CBA defined the term "grievance" and detailed a process for resolving grievances, including the use of final binding arbitration. Section 31 of

> the CBA contained a "no-strike clause:" "There shall be no cessation or stoppage of work, service or employment, on the part of, or at the instance of either party, during the term of this Agreement."

Id. (internal citations omitted).

The original CBA included a number of location specific riders, unrelated to arbitration or grievance procedure. *See Local Union No. 3 and Time Warner Cable*, 363 NLRB No. 29-CB-125701, at 11 (2015).

B. Memorandum of Agreement

The parties signed a Memorandum of Agreement ("MOA") on March 28, 2013, extending the original CBA, with some modifications, to March 31, 2017; this constituted the new CBA. *International Brotherhood of Electrical Workers*, No. 17-CV-5357, 2017 WL 4280591, at *2. Changes did not apply to the section banning strikes, or those dealing with arbitration or grievance procedure. *See* Kevin Smith Declaration ("Smith Decl."), ECF No. 37, Exh. B, Dec. 6, 2017. One week later, Local 3's members unanimously voted to ratify the MOA. *Id.*

After a protracted argument over whether the riders in the original CBA would carry over to the new CBA, Local 3 refused to sign the agreement. *Local Union No. 3*, 363 NLRB No. 29-CB-125701 at 15.

C. Local 3's Continued Acceptance of, and Benefit from, the CBA

Immediately following ratification of the MOA, the employer implemented the new CBA, including increased wages and improved benefits for Local 3 members. Smith Decl. at 3.

From March 31, 2013 through March 10, 2015, Local 3 continued to acknowledge the new CBA's effectiveness by taking advantage of grievance and arbitration procedures. *Id.* at 7. Over this period the union demanded fourteen arbitration proceedings pursuant to the "terms of

an agreement between the parties." Smith Decl., Exh. D. In their "Notice of Intent to Arbitrate," Local 3 regularly referenced the terms of the new CBA. *See e.g.* Smith Decl., Exh. D., Arbitration Notice, Mar. 10, 2015 ("Whether the Employer violated the collective bargaining agreement by subcontracting Business Service Class service calls.").

In decisions resolving disputes, arbitrators cited and relied on section 24 of the new CBA (Grievance and Arbitration) as their basis for jurisdiction.

> This matter comes before the undersigned Arbitrator pursuant to a demand for arbitration filed by Local 3 . . . Local 3 and [Charter] are parties to a Collective Bargaining Agreement . . . the Company renewed its argument that the grievance was not arbitrable because Local 3 failed to comply with the terms of . . . the CBA . . . The Union contended that it, in fact, complied with the requirements of the CBA.

Smith Decl., Exh. E., American Arbitration Association Case No. 01-0000-5575 at 1, 5-6.

D. National Labor Relations Board ("NLRB") Decision 1

In response to Local 3's refusal to sign the new CBA, the employer, in March of 2014, filed a complaint with the "NLRB claiming that Local 3 engaged in an unfair labor practice by refusing to sign a collective bargaining agreement implementing the changes in the MOA." *International Brotherhood of Electrical Workers*, No. 17-CV-5357, 2017 WL 4280591, at *2. Both parties effectively conceded that the MOA extended the underlying terms of the original CBA, including the prohibition on striking; the dispute centered on whether Local 3 committed an unfair labor practice by refusing to sign the new CBA without the riders. *See* Smith Decl., Exh.'s F, J.

A three judge panel of the NLRB affirmed a decision of an Administrative Law Judge ("ALJ") finding that Local 3 had not committed an unfair labor practice by refusing to sign the new CBA. *Local Union No. 3*, 363 NLRB No. 29-CB-125701. The ALJ who presided over the initial hearing, held:

> there was no meeting of the minds in March 2013 when the parties signed the MOA, that Riders would be excluded from the successor agreement as contended by [Charter] . . . the terms of the MOA were ambiguous as to whether the riders from the previous agreements were to be included in the successor agreement.

Id. at 18.

In their motion papers, and during the hearing, Local 3 argued that the new CBA was binding and that a meeting of the minds existed to include the riders. The ALJ rejected this argument:

> I make no findings that [Local 3] is correct in its assertion that a meeting of the minds has been established that the successor agreement would include all the riders . . . Indeed this was the position espoused by [Local 3] in its charge to the Region.

Id. at 19.

E. NLRB Decision 2

In a separate ruling, on June 14, 2016, an ALJ held that the no-strike clause in the original CBA continued to be enforceable against members of Local 3. *Time Warner Cable and Local Union No. 3*, NLRB No. 02-CA-126860 at 13 (2016) (internal citation omitted) ("[T]he intention of the parties was reflected in the [MOA], which incorporated certain provisions from the expired CBA, including the no-strike clause. The [MOA] constituted a clear continuation of the waiver of employees' rights set forth in the expired CBA ... Therefore, the no-strike clause, which remained in effect on April 2, prohibited the four discriminatees from the 'cessation or stoppage of work, service or employment on April 2.'").

The ALJ found that the prior NLRB decision was binding as to the non-inclusion of the riders, but that the signing of the MOA extended the applicability of the no-strike clause under the CBA.

> The Board's decision in, [353 NLRB No. 30 (N.L.R.B. 2015)] serves as the law of the case on the issue of whether there was an agreement between the parties regarding the expired CBA by virtue of the [MOA] entered into by the parties:

> there was no meeting of the minds as to significant portions of the agreement (the inclusion of local Riders) and thus, the parties did not agree to all of the material terms of a successor CBA.
>
> It is the [MOA] and not the inability to agree to a successor CBA, which is dispositive with respect to the applicability of the no-strike clause to the events of April 2. The no-strike clause was among the numerous provisions of the expired CBA that were to carry over to the successor CBA but were not mentioned in the [MOA]. Its incorporation by reference in the [MOA] is evidenced by the introduction: '[T]he changes summarized below were agreed upon *relative to the [CBA] which will expire on March 31, 2013* and that the full text of the applicable changes will be incorporated in a new [CBA] which shall become effective upon ratification by the Union membership, scheduled for April 4, 2013." (emphasis supplied) The only reasonable interpretation of that preamble is that the changes mentioned [in] the [MOA] were being added to the language of the expired CBA along with those provisions not mentioned.

Id. at 11-12.

III. Law

A. Summary Judgment

Summary judgment is appropriate where no genuine disputes of material fact exist and the movant is entitled to judgment under the law. *See Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). In reviewing a summary judgment motion a court construes the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B. Jurisdiction Under the Labor Management Relations Act

Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), provides federal district court jurisdiction for any suit involving contractual disputes between an "employer and a labor organization." *Wynn v. AC Rochester*, 273 F.3d 153, 157 (2d Cir. 2001). Jurisdiction under § 301 "will lie to enforce any 'interim' agreement that the employer and union may reach to preserve labor peace until a new CBA can be negotiated." *United Paperworkers Int'l Union, AFL-CIO, Local 274 v. Champion Int'l Corp.*, 81 F.3d 798, 802 (8th Cir. 1996)

(citing *United Paperworkers Int'l Union v. International Paper Co.*, 920 F. 2d 852, 859 (11th Cir. 1991)); *Mack Trucks, Inc. v. Int'l Union, United Auto, Aerospace & Agr. Implement Workers of Am., UAW*, 856 F.2d 579, 584–85 (3d Cir. 1988) ("Thus, a district court retains independent jurisdiction to decide a case properly brought under § 301, even if the claim may also constitute an unfair labor practice under the NLRA.").

The decisions of the NLRB are non-binding on a district court when deciding a contractual dispute over arbitration.

> Although the Board has occasion to interpret collective-bargaining agreements in the context of unfair labor practice adjudication, the Board is neither the sole nor the primary source of authority in such matters. "Arbitrators and courts are still the principal sources of contract interpretation." Section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185, "authorizes *federal courts* to fashion a body of federal law for the enforcement of ... collective bargaining agreements." We would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract.

Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B., 501 U.S. 190, 202–03 (1991) (internal citations omitted) (emphasis in original).

C. Intent to be Bound

A party may adopt a CBA through conduct which manifests an intent to be bound, and may "agree to," even "unsigned CBAs." *Brown v. C. Volante Corp.*, 194 F.3d 351, 355 (2d Cir. 1999) (citing *Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998)) ("Both [the LMRA] and general principles of contract law permit an employer to adopt a collective bargaining agreement by a course of conduct plus a writing such as the certification line on the contribution report; a signature at the bottom of the collective bargaining agreement itself is unnecessary.").

Courts focus on whether the surrounding circumstances indicate a binding agreement. *Bobbie Brooks, Inc. v. Int'l Ladies' Garment Workers Union*, 835 F.2d 1164, 1169 (6th Cir.

1987) ("[T]he course of conduct by the Company after the July 18th meeting suggests that a contract had been formed. Grievances were processed as usual, and union dues were checked off. Of particular importance is the Company's implementation of the economic terms of the agreement."); *Washington Heights-W. Harlem-Inwood Mental Health Council, Inc. v. Dist. 1199, Nat. Union of Hosp. & Health Care Employees, RWDSU, AFL-CIO*, 748 F.2d 105, 108 (2d Cir. 1984) ("[T]he Council participated fully in at least two arbitrations, apparently never claiming that no agreement to arbitrate existed. Indeed, in one arbitration the Council's attorney submitted a posthearing summation dated July 19, 1982—well after the Union sought arbitration in the Lane dispute—in which he relied on a provision in the 1979–80 agreement concerning arbitration."); *C. Volante Corp.*, 194 F.3d at 356 ("[A]ppellant paid its employees the wage scales set forth in the unsigned CBAs."); *Mack Trucks*, 856 F.2d at 592 ("Mack and the UAW ended the bargaining session with a 'handshake meeting,' congratulated each other on reaching a new agreement . . . on May 3, 1987, an overwhelming majority of the affected UAW members voted to ratify the new agreement. Union ratification is generally considered to be 'the last act necessary ... to create a meeting of the minds and an enforceable agreement.'").

Parties may adopt a successor CBA even where there may not be a meeting of the minds on every detail of the agreement. *E. Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 1546, 1551 (11th Cir. 1988) ("[T]he fact that Eastern currently claims wide areas of difference in the interpretation of six important terms is not, of itself, sufficient to support a finding of no contract. Here, as noted by the district court, the outward indicia of agreement point indisputably to a contractual arrangement."); *Bobbie Brooks,* 835 F.2d at 1168 ("[P]arties can form a binding agreement which they intend to be final, despite leaving certain terms open for future negotiation.").

IV. Application of Law

Local 3's conduct manifested an intent to be bound by the no-strike and grievance and arbitration procedures found in the new CBA. This is evidenced by the following: (1) Local 3 and Charter signed a MOA on March 28, 2013, extending the CBA, with amendments, to March 31, 2017; (2) Local 3's 1,300 members unanimously ratified the MOA; (3) Charter implemented, and Local 3 accepted, pay raises, improved benefits and other negotiated changes in the MOA; (4) for almost two years after the signing of the MOA, Local 3 continued to demand arbitration proceedings relying on the new CBA as a binding agreement.

Neither the MOA, nor any discussion between the parties signaled that the new CBA's validity depended on adoption of the riders. *Bobbie Brooks*, 835 F.2d at 1168 ("If the parties agreed to defer negotiation of the non-union production side letter as part of the July 18th agreement, then a binding contract exists. However, if the contract was made explicitly subject to resolution of the non-union production issue, it is not binding."); *see also* Stephen L. Brodsky, *Enforcing Preliminary Agreements Under New York Federal Law*, NYLJ, Jan. 5, 2018.

Even if some terms of a collective bargaining agreement are in dispute, parties may intend to remain bound by provisions requiring arbitration. *Washington-Heights*, 748 F.2d at 108 ("Under this view, which is also urged by the Union, the parties at least agreed to be bound by the grievance and arbitration provisions of the 1979–80 agreement while they attempted to reduce their successor agreement to writing.").

The parties' action in signing the MOA, and their continued conduct, in following its primary terms, indicates that the parties intended to be bound by the no-strike and grievance provisions. *See e.g. Washington Heights--W. Harlem--Inwood Mental Health Council, Inc. v. Dist. 1199, Nat. Union of Hosp. & Health Care Employees, RWDSU, AFL-CIO*, 608 F. Supp. at

396 (S.D.N.Y. 1985) ("There was an oral understanding on a successor collective bargaining agreement, even if there was not a meeting of the minds on all the details of that accord.").

The court's decision is limited to a finding that the parties were bound by the no-strike, grievance and arbitration provisions of the new CBA. The court takes no position on the enforceability of the riders or any other sections of the CBA.

V. Conclusion

Charter's motion for summary judgment is granted. The parties shall proceed to arbitration.

SO ORDERED.

/s/ Jack B. Weinstein
Jack B. Weinstein
Senior United States District Judge

Dated: February 16, 2018
Brooklyn, New York

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February 22, 2018

By NLRB E-Filing

Gary Shinners, Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Re: Time Warner Cable New York City LLC
Case 02-CA-126860
Our File No. 25179.0009

Dear Mr. Shinners:

On behalf of Charging Party IBEW, Local 3, I write in response to Respondent's February 20, 2018 letter concerning the recent holding by Senior U.S. District Judge Jack B. Weinstein in IBEW Local 3 v. Charter Communications, Inc., Docket 17-cv-5357 (E.D.N.Y. February 16, 2018).

As you are aware the NLRB previously held that there was no contract between IBEW, Local 3 and Charter Communications, f/k/a Time Warner Cable of NYC LLC, (*see*, 363 NLRB No. 30). The most recent decision issued by Judge Weinstein has no effect on the NLRB's prior decision holding that there is no contract. Additionally, it also has no bearing on the NLRB's appeal between the same parties (02-CA-126860). As you are aware, pursuant to the Federal Rules of Appellate Procedure 15(a)(1) review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. To date, the employer has never filed an appeal of the NLRB's decision in 363 NLRB No. 30.

In essence, Charter Communications has attempted to circumvent the federal rules, in not one, but two separate proceedings before Judge Weinstein. As such, the Union intends to appeal Judge Weinstein's decision on this and other grounds wherein he erroneously determined "the parties shall proceed to arbitration."

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We ask that the aforementioned matter continue to be decided by the Board, on the record and merits before it. To be clear, Judge Weinstein has only ordered that the parties proceed to arbitration. The issues presented to the NLRB in both 02-CA-126860 and 363 NLRB No. 30 have not been decided by any court of competent jurisdiction (i.e. F.R.A.P. 15(a)). The Board's 2015 Decision holding that there was "no meeting of the minds and no contract" is still controlling law.

Respectfully submitted,
/s/ Marty Glennon
Marty Glennon

cc: Allen M. Rose, Esq., Counsel for the General Counsel
(By email: Allen.Rose@NLRB.gov)
Kenneth A. Margolis, Esq., Respondent's Counsel
(By email: Margolis@kmm.com)

757847

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March 6, 2018

(By E-filing)
Hon. Gary W. Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: Time Warner Cable New York City LLC
Case No. 02-CA-126860

Dear Mr. Shinners:

Pursuant to Section 102.6 of the Board's Rules and Regulations, Counsel for the General Counsel responds to Respondent Time Warner Cable's notice of supplemental authority discussing a district court decision in *IBEW, Local Union No. 3 v. Charter Communications, Inc.*, No. 17-cv-5357, 2018 WL 948754 (E.D.N.Y. Feb. 16, 2018), which is a new lawsuit involving the Charging Party and the Respondent, but not the Board.[1]

In the unfair labor practice case now pending before the Board on exceptions, the parties disagree as to whether a no-strike agreement was in effect between April 1, 2013 and March 31, 2017. The judge in the district court decision to which the Respondent calls attention found that a no-strike agreement was in effect during the relevant time period. Respondent takes the position that the district court's ruling, which compels the parties to submit a dispute arising from a March 2017 strike to arbitration, is "conclusive[]" as to the merits of the pending exceptions.

Respondent's preclusion argument is untenable. Since the Government was not a party to the district court litigation, the General Counsel is not precluded from litigating the same issue before the Board. *See Precision Industries*, 320 NLRB 661, 663 (1996), enfd. 118 F.3d 585 (8th Cir. 1997). In addition, over two years before the district court decision, the Board adopted an administrative law judge's finding that there was "no meeting of the minds and no contract" between the parties. *Electrical Workers, Local 3*, 363 NLRB No. 30, slip op. at 18 (2015). If

[1] Charter Communications, Inc. purchased Respondent's parent company in 2016.

anything, the Board's earlier findings should have precluded relitigation of the same issue in the district court case. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966).

While the district court's decision has no binding impact on the pending ULP case, it is immediately appealable to the Second Circuit Court of Appeals. The Board should consider acting expeditiously so that any review of its prospective decision in this case may occur at the same time as any appeal from the district court's decision.

Sincerely,

Allen M. Rose
Counsel for the General Counsel

cc: Marty Glennon, Esq. (by email)
Counsel for the Charging Party

Kenneth A. Margolis, Esq. (by email)
Counsel for the Respondent

A-616

FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TIME WARNER CABLE NEW YORK CITY, LLC

and **Case 02-CA-126860**

LOCAL UNION NO. 3 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Date of Mailing: March 6, 2018

AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S LETTER TO THE EXECUTIVE SECRETARY DATED MARCH 6, 2018

I, the undersigned employee of the National Labor Relations Board, state under oath that, on the date indicated above I served the above-entitled document(s) by electronic mail (email), as indicated below, upon the following persons, addressed to them at the following addresses:

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Melville, New York 11747-9064
mglennon@abgllaw.com

March 6, 2018 .
Date

Allen M. Rose Board Agent
Print Name Title

Signature

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIME WARNER CABLE NEW YORK CITY LLC, Petitioner, - against - NATIONAL LABOR RELATIONS BOARD, Respondent.	PETITION FOR REVIEW

TIME WARNER CABLE NEW YORK CITY LLC hereby petitions the United States Court of Appeals for the Second Circuit for review of that part of the Decision and Order of the National Labor Relations Board, Case 02-CA-126860, issued on June 22, 2018, and reported at 366 NLRB No. 116, relating to the findings and conclusion that Time Warner Cable New York City LLC violated Section 8(a)(1) of the National Labor Relations Act, and the related remedial order.

Dated: July 20, 2018 at New York, New York

KAUFF MCGUIRE & MARGOLIS LLP
Counsel for Petitioner
Time Warner Cable New York City LLC

By: _____
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United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570-0001

August 29, 2018

Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square, Room 1802
New York, NY 10007

Re: *Time Warner Cable New York City, LLC v. NLRB*
2nd Cir. No. 18-2323
Board Case No. 02-CA-126860

Dear Ms. Wolfe:

I am enclosing the National Labor Relations Board's cross-application for enforcement of its Order in this case.

Please serve a copy of the cross-application on the Petitioner, Time Warner Cable New York City, LLC, whose address appears on the service list. I have served a copy of the cross-application on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of

any correspondence the Court sends to counsel in this case. The Board attorneys directly responsible for this case are Kira Vol, (202) 273-0656 and Valerie Collins, (202) 273-1978.

Very truly yours,

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570-0001
(202) 273-2960

Encls.

SERVICE LIST

Time Warner Cable New York City, LLC, *v. NLRB*
Board Case No. 02-CA-126860

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